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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 39

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

vs.

KING PACKING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 9, 1955
CERTIORARI GRANTED APRIL 25, 1955

No. 13540

United States
Court of Appeals
for the Ninth Circuit

MAURICE J. TOBIN, Secretary of Labor, United States Department of Labor,

Appellant,

vs.

KING PACKING COMPANY, a corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Idaho, Northern Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States for the District of Idaho, Southern Division

Civil Action File No. 2797

MAURICE J. TOBIN, Secretary of Labor, United States Department of Labor,

Plaintiff,

vs.

KING PACKING COMPANY, a corporation,

Defendant.

COMPLAINT

I.

Plaintiff brings this action to enjoin defendant from violating the provisions of Sections 15(a)(1), 15(a)(2), and 15(a)(5) of the Fair Labor Standards Act of 1938 as amended (Act of June 25, 1938, c. 676, 52 Stat. 1060; as amended by Act of October 26, 1949, 63 Stat. 910; U.S.C. Title 29, Sec. 201 et seq. hereinafter called the Act.

II.

Jurisdiction of this action is conferred upon the Court by Section 17 of the Act.

III.

Defendant is, and at all times hereinafter mentioned was, a corporation organized under and existing by virtue of the laws of the State of Idaho, having its principal office, place of business and a meat packing plant located approximately two miles east of the City of Nampa, County of Canyon, State

of Idaho, within the jurisdiction of this Court, and is, and at all times hereinafter mentioned was, engaged at that place of business in the production, sale and distribution of meat and meat products.

IV.

At all times hereinafter mentioned, defendant employed and is employing approximately 72 employees in and about its place of business near Nampa, Idaho, in the production of meat and meat products, including approximately ten killing floor employees and approximately eight cutting or trimming room employees engaged in the dressing, butchering, cutting, trimming and production of livestock, meat and meat products for interstate commerce, within the meaning of the Act. Substantially all of the goods produced by these employees have been, and are being, produced for interstate commerce and have been, and are being, shipped, delivered, transported, offered for transportation, and sold in interstate commerce from defendant's said place of business to other States.

V.

On October 21, 1938, the Administrator of the Wage and Hour Division, United States Department of Labor, pursuant to the authority conferred upon him by Section 11(c) of the Act, duly issued and promulgated regulations prescribing the records of persons employed and of wages, hours, and other conditions and practices of employment to be made, kept, and preserved by every employer subject to any provision of the Act. The said regula-

tions, and amendments thereto, were published in the Federal Register and are known as Title 29, Chapter V, Code of Federal Regulations, Part 516.

VI.

Defendant, an employer subject to the provisions of the Act, continuously has violated and is violating the provisions of Sections 11(c) and 15(a)(5) of the Act in that since October 21, 1948 it has failed to make, keep and preserve adequate and accurate records of the hours worked by its killing floor and cutting or trimming room employees as prescribed by the said regulations, in that the records kept by defendant failed to show adequately and accurately, among other things, the total hours worked by said employees each workday and each workweek including the time spent in the performance of a principal activity, to wit, the care and sharpening of the knives with which their work is accomplished.

VII.

Defendant continuously has violated and is violating the provisions of Sections 7 and 15(a)(2) of the Act by employing its killing floor and cutting or trimming room employees referred to in Paragraph IV in the production of goods for interstate commerce, within the meaning of the Act as aforesaid, for workweeks longer than 40 hours since October 21, 1948, without compensating these employees for all their employment in excess of 40 hours, in such workweeks during such period, at rates not less than one and one-half times the regular rate at which they were employed.

VIII.

Defendant continuously has violated and is violating the provisions of Section 15(a)(1) of the Act in that since October 21, 1948 it has shipped, delivered, transported, offered for transportation, and sold in intersfate commerce from its said place of business to other States, goods in the production of which its killing floor and cutting or trimming room employees referred to in Paragraph IV were employed in violation of Section 7 of the Act as alleged.

IX.

Defendant has, since October 21, 1948, continuously violated the aforesaid provisions of the Act. A judgment enjoining and restraining the violations hereinabove alleged is specifically authorized by Section 17 of the Act.

Wherefore, cause having been shown, plaintiff demands judgment permanently enjoining and restraining defendants, its agents, servants, employees, and attorneys, and all persons acting or claiming to act in its benalf and interest, from violating the provisions of Sections 15(a)(1), 15(a)(2) and 15(a)(5) of the Act, and such other and further relief as may be necessary and appropriate.

/s/ WILLIAM S. TYSON,
Solicitor

/s/ JOHN J. BABE,
Assistant Solicitor

/s/ KENNETH C. ROBERTSON,
Regional Attorney

/s/ JAMES F. SCOTT,
Senior Attorney
United States Department of Labor
Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 25, 1950.

[Title of District Court and Cause.]

MORE DEFINITE STATEMENT

In accordance with the stipulation entered into by the parties to this action through their respective attorneys, plaintiff hereby voluntarily furnishes defendant with the following more definite statement:

1. The violations with which plaintiff is concerned arise only from the time spent by killing floor and cutting or trimming room employees before or after their regularly scheduled working hours in sharpening and caring for the knives which are used in their work and with with their work is accomplished and which time defendant neither paid for (Sections 7 and 15(a)(2) nor recorded (Sections 11(c) and 15(a)(5)).

2. Plaintiff contends that such violations have occurred at least in every full week worked by every such employee since October 21, 1948, and so far as plaintiff knows, are still continuing.

3. The exact number of hours involved in each week cannot be alleged with accuracy at this time and will be a matter of proof.

4. The Section 15(a)(1) violations are deriva-

tive and every interstate shipment or delivery for interstate shipment was such a violation if it is established that Section 7 violations occurred, as outlined above.

/s/ WILLIAM S. TYSON,
Solicitor

/s/ JOHN J. BABE,
Assistant Solicitor

/s/ KENNETH C. ROBERTSON,
Regional Attorney

/s/ JAMES F. SCOTT,
Senior Attorney,
United States Department of Labor
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 17, 1951.

[Title of District Court and Cause.]

ANSWER

Comes now the above named defendant, and for answer to the Complaint and More Definite Statement of the plaintiff in the above entitled action, admits, denies and alleges as follows:

I.

That the defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph I of the Complaint and, therefore, and upon that ground, de-

nies the same, and the whole thereof, and each and every allegation therein contained.

II.

That the defendant denies paragraph II of said Complaint, and the whole thereof, and each and every allegation therein contained.

III.

That the defendant admits paragraph III of plaintiff's Complaint.

IV.

That the defendant admits the allegations of paragraph IV of plaintiff's Complaint.

V.

Answering paragraph V of plaintiff's Complaint, defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations therein contained and, therefore, and upon that ground, denies the same, and the whole thereof, and each and every allegation therein contained.

VI.

Answering paragraph VI of plaintiff's Complaint, as explained by plaintiff's More Definite Statement, defendant denies the same, and the whole thereof, and each and every allegation therein contained. excepting that defendant admits that its records do not show the time spent by its employees in any work day, or in any work week, in sharpening and caring for knives before or after their regularly scheduled working hours.

VII.

Answering paragraph VII of plaintiff's Complaint, as explained by plaintiff's More Definite Statement, defendant denies the same, and the whole thereof, and each and every allegation therein contined, excepting that defendant admits that the time spent by any of its employees in sharpening and caring for knives before or after their regularly scheduled working hours has not been compensated at one and one-half times the regular rate of pay when the time of such employee in doing the work he is employed to do, plus the time he spends in sharpening and caring for knives before or after his regularly scheduled working hours exceeds forty hours in any week.

VIII.

That the defendant denies paragraph VIII of plaintiff's Complaint, and the whole thereof, and each and every allegation therein contained.

IX.

That the defendant denies paragraph IX of plaintiff's Complaint, and the whole thereof, and each and every allegation therein contained.

As a first and further separate and affirmative defense to plaintiff's Complaint, defendant alleges as follows:

I.

In the light of the realities of the industrial world, the time spent by killing floor or cutting or trimming room employees before or after their reg-

ularly scheduled working hours in sharpening and caring for the knives, which are used in their work and with which their work is accomplished, is inconsequential, insignificant and of a trifling nature, so that the Court should grant no relief on the basis of the de minimis doctrine.

As a second and further separate and affirmative defense to plaintiff's Complaint, defendant alleges as follows:

I.

That plaintiff's Complaint and More Definite Statement fail to show grounds for the exercise of the equity jurisdiction of this Court.

Wherefore, defendant prays that plaintiff's Complaint be dismissed; that it have judgment for its costs and disbursements herein incurred and expended; and for such other and further relief as may be meet and proper in the premises.

Dated: Aug. 7, 1951.

/s/ W. H. LANGROISE,
/s/ W. E. SULLIVAN,
Attorneys for Defendant.

[Endorsed]: Filed Aug. 8, 1951.

[Title of District Court and Cause.]

OPINION

Healy, Acting District Judge:

This is an action by the Secretary of Labor to enjoin King Packing Company from the continu-

ance of alleged violations of the Fair Labor Standards Act.

The question involved, I take to be one of mixed law and fact. It is whether time spent by employees, called knife men, in sharpening their knives outside their regularly scheduled shift time is compensable, or whether, on the contrary, such activity is preliminary or postliminary to the employees' principal activities and thus within the ban of Section 4(a)(2) of the Portal-to-Portal Act. It is undisputed that the activity is not compensable by contract or by custom at the plant.

Ordinarily the sharpening is done in a room provided by the employer for the convenience of the knife men. The latter may, however, sharpen their knives at their homes or at any place that suits their convenience. The evidence is that they are employed to perform work in the killing and cutting rooms of the plant in the slaughter of cattle and hogs, and in the cleaning and cutting up of the carcasses. These are their principal activities. They are obviously not employed to sharpen knives. The knives are their own tools with which they are required by the terms of their employment to equip themselves for the proper performance of the work they are employed to do.

If there were no more to the case than this, the activity would clearly be preliminary or postliminary to the principal activities which these employees are hired to perform. But it is contended, in effect, that the uncompensated activity is work of the same kind the knife men perform during their

regular working hours, hence that the case is ruled by Biggs vs. Joshua Hendy Corporation, 9 Cir., 183 F. 2d 515.[1] The argument is predicated on the circumstance that these employees carry a steel and continually steel their knives throughout the course of the working shift. By custom or practice at the plant the time spent in steeling is compensable.

The argument has a degree of plausibility but I am not greatly impressed by it. The sharpening work done by the employees off shift is accomplished by use of a whetstone, grindstone, or emery wheel. The process differs materially from the steeling in that it entails the use of different means, is more cumbersome, and apparently has a distinctive purpose. Not unfairly, I think, one may describe the last-named difference by saying that the object of the off-shift activity is to put an edge on a dull knife, whereas that of steeling is to keep it there for the duration of the shift. In my opinion the differences described are sufficiently substantial to justify the existing variance in custom and usage as between the two processes.[2] Moreover, for obvious

[1] In that case the Court of Appeals said [p. 520] that the Portal-to-Portal Act has no application "where the work for which compensation is being claimed is the same kind of work as was performed throughout the remainder of the workweek."

[2] Consult subsection (c) of Section 4 of the Portal-to-Portal Act, reading as follows: "For the purposes of subsection (b) of this section, an activity shall be considered as compensable under such contract provision or such custom or practice only when it is engaged in during the portion of the day with respect to which it is so made compensable."

reasons it is a matter of practical necessity for the employer to treat the continual steeling process as compensable, whereas no such necessity obtains in respect of the grinding operation. In actuality, of course, neither operation constitutes the "principal activity" which the knife men are employed to perform.

My conclusion is, therefore, that the off-shift activity in question is preliminary or postliminary to the principal activities of these employees. I am convinced that a contrary holding would do violence to the spirit and intent of the Portal-to-Portal Act.

The defendant's production manager, Broces, made a time study over a period of two weeks to determine the length of time spent by employees in sharpening their knives other than during the scheduled shift time. He testified that the average time as disclosed by his study was 10.4 minutes per man per day. Several of the knife men who testified gave it as their opinion that they spend around 20 minutes per day in the process. Naturally, all these witnesses, including Broces, are interested witnesses, but I place greater credence in the study of Broces than in the offhand estimate of the others. However, I am not prepared to agree with the defendant's subsidiary contention that 10.4 minutes per day is de minimis.

Judgment will be for the defendant. Its counsel will prepare and submit findings of fact, conclusions of law and judgment. Plaintiff's counsel may submit objections or propose changes if so advised.

[Endorsed]: Filed May 31, 1952.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial before the Court, sitting without a jury, William S. Tyson, Solicitor, John J. Babe, Assistant Solicitor, Kenneth C. Robertson, Regional Attorney and James F. Scott, Senior Attorney, all of the United States Department of Labor, representing the Plaintiff, and W. H. Langroise and W. E. Sullivan, representing the defendant, and evidence having been presented and arguments of counsel given and briefs having been filed, the Court being fully informed and advised in the premises and having heretofore filed its written opinion, hereby makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

I.

This action arose under the Fair Labor Standards Act of 1938, as amended (Act of June 25, 1938, c. 676, 52 Stat. 1060; as amended by act of October 26th, 1949, 63 Stat. 910; 29 U. S. C. Sec. 210 et seq.) and the Portal to Portal Act (61 Stat. 86, 29 U.S.C. Sec. 251 et seq.).

II.

The Plaintiff, Maurice J. Tobin, is the United States Secretary of Labor, United States Department of Labor.

III.

The Defendant, King Packing Company, is a cor-

poration organized and existing under the laws of the State of Idaho and having its principal place of business in Canyon County, State of Idaho; the Defendant conducts and operates a meat packing plant located near the city of Nampa in Canyon County, State of Idaho.

IV.

The Defendant employs at its plant 70 to 80 employees in its business of slaughtering, preparing, selling and distributing meat and meat products; of these employees twelve to fourteen knife men work on the killing floor and nine or ten knife men in the cutting room, and these knife men are engaged in the production of goods for interstate commerce.

V.

Defendant's employees work on a regular eight hour shift five days a week with one hour off at noon and a five minute rest period both morning and afternoon, for which time they are properly compensated at hourly rates; employees are permitted to take time off without loss of compensation for personal needs and to make telephone calls; if an employees is not more than sixteen minutes late for work he is paid for a full shift.

VI.

The knife men are required by the terms of their employment to furnish their own knives which at all times remain their sole property; they may purchase the knives from the Defendant at cost or obtain them from any other source; they may take the knives home with them at any time, use them for

any private purpose of their own, and take their knives with them when they leave Defendant's employ.

VII.

The Defendant does not permit the knife men to sharpen their knives and place an edge thereon during their regular scheduled shift time, and for the time they spend in so sharpening their knives, using a whetstone, grindstone, or emery wheel, the knife men receive no compensation; the Defendant furnishs a room solely for the convenience of the knife men, in which they may sharpen their knives if they so desire, and Defendant also furnishes an emery wheel and grindstone for the sole convenience of its employees which they may use if they so desire; the knife men are required to furnish their own whetstone which they may purchase any place they wish.

VIII.

No discipline or control of any kind whatsoever is exercised by Defendant over its employees while sharpening their knives, whether done in the knife sharpening room or elsewhere; Defendant does not specify any designated degree of sharpness of knives nor the type of edges thereon, nor the manner nor method of sharpening a knife; each knife man prefers to sharpen his own knives, and they prefer different types of edges on the blades; also a knife man dislikes anyone else using his knives, or sharpening them.

IX.

Frequently throughout the work day the knife

men use steels to keep the edge on their blades, for which time they are compensated; this is a materially different process from putting the edge on the blade, which latter is the sharpening done outside of the regularly scheduled shift time; the steeling of the knives is not a principal activity for which the knife men are employed by Defendant, but the time so spent is compensated for by Defendant by custom or practice.

X.

In as much as steeling the knives must be done frequently during the work day, the time so spent is compensable as a matter of practical necessity.

XI.

The average time spent by a knife man in sharpening the knives outside of his regularly scheduled shift time is 10.4 minutes per man per day.

XII.

The time spent by the employees in sharpening their knives is not compensable by either an expressed provision of a written or a nonwritten contract between such employees, their agent, or collective-bargaining representative and Defendant; or by a custom or practice at Defendant's plant where such employees are employed.

XIII.

The principal activity or activities which the knife men are employed by Defendant to perform are the killing, cleaning and cutting up of carcasses of cattle and hogs.

XIV.

The sharpening of knives by the employees outside of their regularly scheduled shift time is a preliminary and postliminary activity to the principal activity or activities which such employees are employed by Defendant to perform.

XV.

There is no practical necessity requiring Defendant to compensate its employees for the time spent by them in sharpening their knives outside of the regularly scheduled shift time.

Conclusions of Law

I.

That this Court has jurisdiction of this action and the parties hereto.

II.

That the principal activity or activities which the knife men are employed by Defendant to perform are the killing, cleaning and cutting up of carcasses of cattle and hogs, within the meaning of Section IV of the Portal to Portal Act, 29 U.S.C. Sec. 254.

III.

That the sharpening of knives by the employees outside of their regularly scheduled shift time is a preliminary and postliminary activity to the principal activity or activities which such employees are employed by Defendant to perform, within the meaning of Sec. 4 (a)(2) of the Portal to Portal Act, 29, U.S.C. Section 254 (a)(2).

IV.

That the time spent by the employees in sharpen-

ing their knives is not compensable by either an expressed provision of a written or a nonwritten contract between such employees, their agent, or collecting-bargaining representative and Defendant; or by a custom or practice at Defendant's plant where such employees are employed, within the meaning of Sec. 4 (b) of the Portal to Portal Act, 29 U.S.C. Sec. 254 (b):

V.

That the time spent in steeling of knives by Defendant's employees during their working day is compensated for by Defendant by custom or practice, but such activity is compensable by said custom or practice only when performed during the regularly scheduled shift time.

VI.

That the time spent by the employees in sharpening their knives outside of the regularly scheduled shift time is not compensable under the provisions of the Fair Labor Standards Act, 29 U.S.C. Sec. 201 et seq. as modified by the Portal to Portal Act, 29 U.S.C. Sec. 251 et seq.

VII.

That the Defendant is not required to compensate its employees for the time spent in sharpening their knives by the provisions of the Fair Labor Standards Act, 29 U.S.C. Sec. 201 et seq. as modified by the Portal to Portal Act, 29 U.S.C. Sec. 251 et seq.

VIII.

That Judgment for the Plaintiff is prohibited by

Sec. 4 of the Portal to Portal Act, 29, U.S.C. Sec. 254.

IX.

That the Defendant is not violating the provisions of Sections 15 (a)(1), 15 (a)(2) or 15 (a)(5) of the Fair Labor Standards Act, 29 U.S.C. secs. 215 (a) (1) 215 (a)(2) 215 (a)(5), as modified by the Portal to Portal Act, 29 U.S.C. Sec. 251 et seq.

X.

That the Defendant is not violating, and has not violated, the Fair Labor Standards Act, 29 U.S.C. 201 et seq., nor any of the provisions thereof, as modified by the Portal to Portal Act, 29 U.S.C. Sec. 251 et seq.

XI.

That the average time of 10.4 minutes per man per day spent by the employees in sharpening the knives outside of their regularly scheduled shift time is no de minimis non curat lex.

XII.

That the relief sought by the Plaintiff is denied.

XIII.

That the Complaint in this action be dismissed with Judgment on behalf of the Defendant.

Let Judgment be entered.

Dated this 8th day of July, 1952.

/s/ WILLIAM HEALY,
Circuit Judge Sitting as District Judge.

Certificate of Service attached.
[Endorsed]: Filed July 11, 1952.

In the United States District Court for the District of Idaho, Southern Division

File No. 2797

MAURICE J. TOBIN, Secretary of Labor, United States Department of Labor,

Plaintiff,

vs.

KING PACKING COMPANY, a corporation,

Defendant.

JUDGMENT

This cause came on to be heard on February 15, 1952, et seq. and was argued by counsel, and the court having filed its written opinion and findings of fact and conclusions of law having been entered,

It Is Hereby Ordered, Adjudged and Decreed that plaintiff take nothing, that the action be and it is hereby dismissed on the merits.

Dated this 8th day of July, 1952.

/s/ WILLIAM HEALY,
Circuit Judge Sitting for
District Judge.

Certificate of Service attached.

[Endorsed]: Filed July 11, 1952.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Maurice J. Tobin, Secretary of Labor, United States Department of Labor, plaintiff herein, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the whole of the final judgment entered in this proceeding on July 11, 1952.

Dated: September 3, 1952.

/s/ WILLIAM S. TYSON,
Solicitor

/s/ BESSIE MARGOLIN,
Assistant Solicitor

/s/ KENNETH C. ROBERTSON,
Regional Attorney

/s/ JAMES F. SCOTT,
Assistant Regional Attorney
United States Department of Labor,
Attorneys for Plaintiff.

[Endorsed]: Filed Sept. 5, 1952.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America,
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby

certify that the foregoing papers are that portion of the original files designated by the parties and as are necessary to the appeal under Rule 75 (RCP) to-wit:

1. Complaint.
2. Summons with Marshal's return attached.
3. Motion for a More Definite Statement of Plaintiff's Complaint.
4. Stipulation filed February 17, 1951.
5. Order withdrawing Motion for More Definite Statement.
6. More Definite Statement.
7. Motion for Extension of Time and Order.
8. Motion to Dismiss.
9. Minutes of the court of July 13, 1951.
10. Minutes of the court of August 1, 1951.
11. Answer.
12. Minutes of the court of Feb. 15, 1952.
13. Minutes of the court of Feb. 18, 1952.
14. Stipulation filed April 16, 1952.
15. Stipulation filed May 3, 1952.
16. Opinion of Judge Healy filed May 31, 1952.
17. Findings of Fact and Conclusions of Law.
18. Judgment.
19. Stipulation filed July 12, 1952, and Order.
20. Notice of Appeal.
21. Designation of Contents of Record on Appeal.
22. Transcript of Testimony.
23. Exhibits Nos. 1 to 23, inclusive.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court, this 11th day of September, 1952.

[Seal] /s/ ED M. BRYAN,
Clerk.

In the United States District Court for the District of Idaho, Southern Division

No. 2797

MAURICE J. TOBIN, Secretary of Labor, United States Department of Labor,

Plaintiff,

vs.

KING PACKING COMPANY, a corporation,

Defendant.

TRANSCRIPT

This matter came on for hearing before the Honorable William Healy, United States Circuit Judge, sitting as United States District Judge, without a jury, at Boise, Idaho on February 15, 1952.

Appearances: William S. Tyson, Esq., John J. Babe, Esq., Kenneth C. Robertson, Esq., James F. Scott, Esq., United States Department of Labor, attorneys for the Plaintiff. William H. Langroise, Esq., Boise, Idaho, W. E. Sullivan, Esq., Boise, Idaho, Attorneys for the Defendant.

G. C. Vaughn, Court Reporter. [1*]

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* Page numbering appearing at foot of page of original Reporter's Transcript of Record.

LEN BROCES

called as a witness by the Plaintiff, after first being duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Scott): Where are you employed?

A. At the King Packing Company.

Q. What position do you hold?

A. I am Production Manager.

Q. How long have you occupied that position?

A. A couple of years.

Q. As Production Manager, do you have supervision of the killing floor and the trim or cutting room? A. I do.

Q. Did you bring with you *a* certain knives that we subpoenaed in this case? A. I did.

Q. Would you get those knives for us, if you please? A. Yes, sir.

Mr. Scott: I would like to have this witness identify some of these knives for us.

The Court: You may proceed.

Q. Will you identify this?

A. This is a sticking knife.

Mr. Scott: I would like to have this identified as Exhibit No. 1.

Q. Will you explain the purposes of the sticking knife?

A. Well it is one of the knives used in butchering and sometimes for trimming.

Q. Did you say sticking knife?

(Testimony of Len Broces.)

A. A steak knife.

Q. Now this has been identified as Exhibit No. 2. Will you tell us what that is? [3]

A. That is a knife that is owned by Gene Lohusohr.

Q. And who owned the first knife that was handed to you?. A. The company.

Q. What is the purpose of this knife, Exhibit No. 2?

A. That is a siding knife, to skin out the side.

Q. And is that furnished by the Company or the employees?

A. That is furnished by the employees.

Mr. Scott: We offer this in evidence as Exhibit No. 2.

The Court: It may be admitted.

Mr. Scott: I would like to have this marked as Exhibit No. 3.

Q. What is that Mr. Broces?

A. That is a boning knife and is owned by Wesley Anderson.

Q. And what is the purpose of a boning knife?

A. The purpose is to trim the hog heads and to trim pork of all kinds.

Mr. Scott: We ask this to be identified as Exhibit No. 4.

Q. I will ask you what that Exhibit is?

A. That is a hog shaving knife, and that is owned by Glen Dennis.

Q. And what is the purpose of that knife?

(Testimony of Len Broces.)

A. That is to shave the hair off hogs.

Mr. Scott: We offer these in evidence as Plaintiff's Exhibits .[4]

The Court: They may be admitted.

Q. You have been handed Exhibit marked as Plaintiff's Exhibit No. 5, what is that?

A. That is a sheep knife and it is used to leg, —we are not butchering sheep now but it is also used to gut hogs and head cattle.

Mr. Scott: We offer in evidence Exhibit No. 5.

The Court: It may be admitted.

Q. Who owns that knife, if you know?

A. That also belongs to Glen Dennis.

Mr. Scott: We ask that this be identified as Exhibit No. 6.

Q. You have been handed No. 6 and I will ask you what that is?

A. That is a knife furnished by the Company and it is a spare rib knife.

Q. And what is that used for?

A. That is used to lift the spareribs out of the carcass.

Mr. Scott: We offer that as evidence at this time.

The Court: It may be admitted.

Q. This has been marked as Exhibit No. 7. Will you state what that is.

A. That is a ham skinning knife, and that is owned by the Company and furnished by the Company.

Q. What is the purpose of that knife?

(Testimony of Len Broces.)

A. That is to skin the fat off hams; off the legs. [5]

Mr. Scott: We offer Exhibit No. 7 in evidence at this time.

The Court: It may be admitted.

Mr. Scott: We ask that this be marked as Exhibit No. 8.

Q. You are handed No. 8. Will you tell us what that is?

A. That is a shoulder trimming knife and that is owned by the company and its purpose is to skin off the shoulders.

Mr. Scott: We offer this in evidence as Plaintiff's Exhibit No. 8.

The Court: It may be admitted.

Q. This has been marked as Exhibit No. 9, will you identify that and tell us what it is?

A. Yes, this is a loin pulling knife that is owned by the company, we have a right and a left of these knives.

Q. Is Exhibit No. 9 a right or a left?

A. That is a right.

Q. What would be the difference between them and the left?

A. Well, you trim out the right loin along the back and you hold it in this position (indicating).

Q. You mean by holding it in this position it is horizontal?

A. Yes, the left hand is shaped opposite to this knife. [6]

Q. That is on the other knife, the left; the

(Testimony of Len Broces.)

blade would be shaped in the opposite direction?

A. That is right.

Mr. Scott: We offer this in evidence as Plaintiff's Exhibit No. 9.

The Court: It may be admitted.

Q. Do you have a belly trimming knife?

A. We don't have one at the present time, but the boys use their own.

Q. Do you have a skinning knife?

A. That is No. 2.

Q. No. 2 is identified, I believe, as a siding knife. A. That is the same thing.

Mr. Scott: As I understand it, all of these Exhibits are introduced and admitted at this time. Is that right, Mr. Clark?

The Clerk: That is right.

Mr. Scott: We ask that this be identified as Exhibit No. 10.

Q. You have been handed Exhibit No. 10, will you tell us what that is?

A. That is a knife steel owned by myself.

Q. What do you use it for?

A. Sharpening knives. We depend on that about ninety percent of the time in butchering, to trim pork and in other work, to keep the knives sharp.

Q. You hold it by the handle and rub the knife up and down the blade or rub a piece of steel? [7]

A. That is right.

Mr. Scott: We offer this Exhibit No. 10 in evidence at this time.

(Testimony of Len Broces.)

The Court: It may be admitted.

Q. As I understand your testimony, Mr. Broces, the loin knife, the ham skinning knife and the shoulder skinning knife and also the sparerib knife, they are all furnished by the Company to the employes? A. That is right.

Q. The boning, the shaving, the legging and the skinning of the siding knives are furnished by the employees? A. That is right.

Q. Does the Company sell the latter types of knives to the employees? A. Yes sir, they do.

Q. They sell them at cost, is that right?

A. Yes, we sell them at cost to the employees.

Q. Does the Company sell the steel to the employees? A. Yes, sir.

Q. And the steel is also sold at cost?

A. That is right.

Q. Does the Company sell any other equipment to the employees?

A. Yes, aprons and knife pouches.

Q. Will you describe those aprons and pouches?

A. The aprons are waterproof and cover the clothes [8] pretty much, to keep the grease and the blood off the clothes and the knife pouch if worn outside of the apron on a belt and it carries the knives.

Q. Do you have a copy of the collective agreement of the Defendant Company in use at the plant which has been requested by a subpoena?

Mr. Sullivan: We have it here, Mr. Scott.

(Testimony of Len Broces.)

Mr. Scott: We ask that this be marked as Plaintiff's Exhibit No. 11.

Q. Mr. Broces, you have what has been identified as Exhibit No. 11. I will ask you if, that is, the current collective bargaining agreement in effect at the plant of the Defendant Company?

A. That is right.

Mr. Scott: We offer this in evidence as Exhibit No. 11.

Mr. Sullivan: That is an executed copy and that belongs to the Defendant. Counsel has said that they could get a copy for substitution.

Mr. Scott: Yes, we will get a copy for substitution.

The Court: That may be admitted at this time with the understanding that a copy will be substituted.

PLAINTIFF'S EXHIBIT No. 11

AGREEMENT

This Agreement entered into this 15th day of September, 1950, by and between The King Packing Co., party of the first part, herein known as the Employer, and The Amalgamated Meat Cutters and Butchers Workmen of N. A., Local No. 368, party of the second part, herein known as the Union, both parties agree to the following rules and conditions.

Section 1. The Employer agrees that the Union may maintain a Union house, but the Employer has the right to hire any one he may choose, Provided

Plaintiff's Exhibit No. 11—(Continued)

however: that every employee shall become a member of the Union by the thirtieth day following the date of employment; Provided however; that the provisions of this Section shall be subject to the election of the employees, as required by Law.

Section 2. Saving Clause. Nothing contained in this agreement is intended to violate any Federal Law, State Law, Rule or regulation made pursuant thereto. If any Section, word or paragraph of this agreement is finally declared either illegal or in conflict with any Federal Law, State Law, Rule or regulation by The United States Supreme Court, both parties agree that such Section, Word or Paragraph shall become inoperative at the time only to the extent it is so effected. Both parties agree that this agreement may be opened by either party upon thirty (30) days written notice only for re-negotiations and agreement regarding the Section, Word or Paragraph invalidated, wages excepted.

Section 3. The Employer agrees and promises to pay to its Employees the wages as set forth in Schedule "'A", attached hereto and made a part hereof.

Section 4. The Employer agrees to allow the Union representative to inspect working conditions at reasonable times; however, he shall not interfere with the operation of the plant in exercising this privilege.

Section 5. In cases where one is receiving better working conditions, or receiving more wages than set forth in this agreement, same shall not be jeop-

Plaintiff's Exhibit No. 11—(Continued)

ardized, or infringed upon by the signing of this agreement.

Section 6. There shall be no Verbal or written agreement between the Employer and employees in violation of this agreement. No employee shall be dismissed, suspended or demoted without good and sufficient cause.

Section 7. Plant seniority shall prevail, and in the event of a lay-off, the last man hired shall be the first to be layed off and the last to be re-employed; Provided further, all employees being transferred from one department to the other, must be qualified to do the job of the man he is replacing.

Section 8. Steady employees shall be those steadily employed for thirty (30) days. In the event of a lay-off, such lay-off shall not cause loss of classification of rating.

Section 9. The following Holidays shall be recognized as legal Holidays, and employees shall receive straight-time pay for eight hours for such specified Holidays, News Year's Day, Labor Day, Thanksgiving Day, Armistice Day, Fourth of July, Decoration Day, and Christmas Day. When any of the above Holidays fall on Sunday, the following Monday shall be a Holiday, and the employees shall suffer no loss of pay. New employees shall work thirty (30) days to be entitled to the Holiday pay.

Section 10. Any employee working for an Employer for a period of one (1) year, shall receive one (1) full week's vacation with pay, and after five (5) years continuous service, two (2) weeks vaca-

Plaintiff's Exhibit No. 11—(Continued)

tion with pay, and after fifteen (15) years continuous service, three (3) weeks vacation with pay. When a Holiday falls in a Vacation week, the first working day of the following week shall be granted in lieu of the Holiday without loss of pay. Vacations shall be granted at the convenience of the employee, with the consideration and approval of the Employer. The service period shall be computed from the first day the employee was employed. Any employee who quits or is discharged, forfeits his seniority.

Section 11. An itemized statement shall be given to each employee of his total earnings and deductions weekly.

Section 12. There shall be no practices by any employee that shall tend to limit production.

Section 13. (Temporary) Eight (8) hours shall constitute a day's work, and forty (40) hours shall constitute a week's work for hourly paid workers, Monday through Friday inclusive. All time worked over and above the prescribed daily or weekly hours shall be time and one-half. All Saturday work shall be paid for at the rate of one and one-half times the scheduled hourly rate. All Sunday work shall be paid for at the rate of two times the scheduled hourly rate. Work performed on the holidays specified in Section 9 hereof shall be paid for at the rate of two times the scheduled hourly rate in lieu of the holiday pay specified in said Section 9. No new help shall be hired when regular help get less than forty (40) hours per week. If any one is called to work

Plaintiff's Exhibit No. 11—(Continued)

they shall receive not less than four hours' work or pay, except in the case of fire or other act of God.

It is agreed that the intent of this section is that there shall be no overtime pay computed on overtime, and that a proper draft of this section to accomplish this purpose shall be prepared and approved in writing by the Federal Wage and Hour Division and thereupon shall be substituted in place of this Section 13.

Section 14. The Employer agrees and promises to laundry, at its own expense, the work Frocks for wholesalemen and the exterior work clothes of employees on the killing floor.

Section 15. Should differences arise between Employer and Employee, such differences shall be first referred to a grievance committee selected by the employees of the employer, all members of which must be such employees.

If the grievance committee is unable to arrive at a solution, such differences shall be referred to the authorized representative of the Union. Should he and the Employer be unable to arrive at a solution, the matter may be referred to a Board of Arbitration, consisting of three persons, one to be chosen by the Employer, and one by the Union and a third who will be agreeable to the first two chosen or selected. There shall be no stoppage of work or lockout pending the decision of the Board of Arbitration. A decision must be made within fifteen (15) days.

Section 16. This agreement shall be in effect and

Plaintiff's Exhibit No. 11—(Continued)

binding from the 1st. day of September 1950, until the 1st. day of September 1952, and shall automatically renew itself from year to year thereafter unless either party notifies the other sixty (60) days in advance in writing of a desire to change the agreement; Provided further, that the Union or Employer may open wage negotiations at any time upon sixty (60) days written notice to the other. The parties hereto do promise and agree that there shall be no strike, stoppage of work, or lockout during the sixty (60) day period referred to in this Section, nor until five (5) days after the party calling such strike, stoppage of work, or lockout shall have notified the other party in writing thereof, and this provision shall apply during the life of this contract and thereafter during any negotiations between the parties for any modification or renewal of this agreement or for any agreement in lieu thereof.

AMALGAMATED MEAT CUTTERS AND
BUTCHER WORKMAN OF N. A.
LOCAL No. 368
/s/ By C. E. FILLMORE,
Secretary

/s/ KING'S PACKING CO.,
Employer Company
/s/ By [Illegible]

SCHEDULE "A"

Classification	Minimum Wage Rates
KILLING FLOOR	
Lead Man	$2.06 per hour
Floorsman and splitter	1.81 per hour
Knocker and Header	1.43 per hour

Plaintiff's Exhibit No. 11—(Continued)

Classification	Minimum Wage Rates
Backer and Rumper	1.70 per hour
Hide dropper	1.57 per hour
Shrouder and Washer	1.36 per hour
Head Checker	1.41 per hour
Paunch dumper	1.33 per hour
Shackler	1.41 per hour
Hide man	1.36 per hour
Common labor	1.20 per hour for thirty days
Common labor	1.26 next five months
Common labor	1.31 per hour until classified, to apply to all department.
HOG TRIM	
Breaker	$1.45 per hour
Loin pull	1.57 per hour
Bellie trimming	1.57 per hour
Boners (Beef)	1.57 per hour
Lard Man	1.61 per hour
SAUSAGE KITCHEN	
Lead Man	$1.81 per hour
First Assistant	1.51 per hour
PICKLE ROOM	
Lead Man	$1.81 per hour
Second Curing Man	1.51 per hour
Dry Cure Man	1.41 per hour
SHIPPING DEPARTMENT	
Beef Breaker	$1.71 per hour
Experienced Assemblemen	1.51 per hour
Employees in the shipping department to be considered as experienced after one (1) year's service.	
MAINTENANCE	
Boiler Man	$ 1.56 per hour
Lead Maintenance Man	74.40 per week
Mechanic	74.40 per week
Maintenance Helper	1.41 per hour
Maintenance Carpenter	1.71 per hour
CLEAN UP CREW	
Lead Man	$1.41 per hour

Plaintiff's Exhibit No. 11—(Continued)

Classification	Minimum Wage Rates
TANK	
Lead Man	$1.41 per hour
Helper	1.33 per hour
SALESMEN Drivers. (five-day operation)	
First Three Months	$58.50 per week
Next Five Months	63.50 per week
Thereafter	71.00 per week
FEMALE HELP	
Lead Woman	$1.27 per hour
Women Start first two weeks	1.01 per week
Next Four Weeks	1.11 per hour
Next Four Weeks	1.16 per hour
Thereafter	1.22 per hour

Mr. Scott: At the present time this is in evidence as I understand it.

The Court: That is right.

Q. Mr. Broces, would you explain the nature of the [9] business and what type of slaughtering the Defendant is engaged in?

A. Cattle and pork.

Q. The Defendant is engaged in the slaughtering of cattle and hogs? A. That is right.

Q. The Defendant's packing plant is located in Nampa, Idaho? A. That is right.

Q. How many employees does the Defendant employ? A. Around 70 or 80.

Q. How many employees on the killing floor?

A. You mean knife men and all?

Q. Well, let us have all of them.

A. Sixteen.

Q. That is altogether? A. Yes, sir.

Q. How many knife men on the killing floor?

(Testimony of Len Broces.)

A. Around 12 to 14 of them.

Q. The same killing floor employes handle the killing of beef and pork? A. That is right.

Q. How many employees do you have in the trim or cutting room? A. Nine or ten.

Q. How many knife men? A. All of them.

* * * * *

Q. Now, when a steer or other beef animal is brought on the killing floor it is first killed and run through a series of operations resulting in the butchered carcass? A. Yes, sir.

Q. And resulting as to the beef a side or half?

A. Yes, sir.

Q. In regards to the pork, the pig is stuck and killed and goes through various operations and comes out a carcass?

A. Yes, sir, one half or side of pork.

Q. And this one half carcass is put in the cooler?

A. That is right.

Q. Can you state the purpose of putting it in the cooler and how long it remains there?

A. The reason is to chill it and our pork we usually like it to be at 38 degrees. You asked how long it remains there, usually we get through around 5:00 and it is cooled until 8:00 the next morning and by that time the hogs are chilled enough to [16] cut up.

Q. And the same is true of the beef?

A. Yes, sir, however, we do like to age the beef a little before we cut it.

Q. How long do you like to age beef?

(Testimony of Len Broces.)

A. Four or five days.

Q. In the cooler? A. Yes, sir.

Q. Using Exhibit No. 12 as to the occupations will you please explain the various steps in butchering beef and hogs, go down the cattle kill and then go down the hog kill and explain the different operations in relation to the jobs?

A. The man that does the knocking, he runs the cattle in the chutes and then he shoots them.

Q. What was that?

The Court: Yes, I didn't get that answer, after they are in the chute he hits them in the head?

A. No, he shoots them with a pistol.

Mr. Sullivan: We object to this if the Court please, we object on the grounds that it is immaterial what each of these men do, it cannot be an issue in this case.

The Court: I doubt that it is material but I will permit counsel to go ahead.

Q. Just go ahead with your answer.

A. The beef is shot and then it is rolled on the floor [17] and it is hung and then the header skins out the head, first he sticks it to bleed and skins out the head then the floormen runs it down on the floor and sets it on its back and takes off the front and hind legs, the rumper places it on the half hoist and finishes skinning, guts it and the gut runner takes these away,——

Q ——The runner removes this part of the animal from the killing floor?

A. Yes, that is right.

(Testimony of Len Broces.)

Q. And the hide salter or saver wheels the hide into the cellar?

A. After the rumper is through, all that is left is the hide around the neck and the shoulders and the hide dropper skins that down and then you have the head boner, he bones the head, all of the meat off the head and after that they are inspected and the meat washer washes the blood off and any other slight matter that there may be and then there is a shroud, a piece of white cloth or sheet put on the beef and pins it on, that is the shrouder does that and then it goes to the cooler.

Q. And what does this tripe man do?

A. He empties the contents.

Q. Of what?

A. The tripe and then it goes into the tripe machine and it is cleaned. [18]

Q. This man termed the washer that reports at 7:20 in the morning and leaves at 4:20 in the afternoon, what does he do?

A. He washes after the hide is drawn.

Q. Now will you give the same explanation for the hog kill?

A. After the hog goes on the roll the sticker lets out the blood after they are dead and they go to the scalding vats and the hair shaved and then they are singed,—what little hair they have left and then we have the washer who washes off the burned hair and then the shaver he finishes the shaving, whatever is left on the carcass and then the head dropper he drops the head so that

(Testimony of Len Broces.)

it can be inspected and then the next man guts the hog and then the next one splits it and the next one brands it and puts on the Government brand or stamp on the carcass; and then the gut runner, he saves the casing, all the fat, the liver and the heart, and then the stomach saver does the same thing as the one that saves the tripe on the beef.

Q. Have you discussed the operation of the singer, the washer and the shackler?

A. Yes, I think I have.

Q. Mr. Broces, when you hire a man to work after the carcass comes into being on the kill floor and goes to the cooler and remains in the cooler for any [19] length of time, where does it go then?

A. The hogs are rolled to the cutting room and then cut up.

Q. And what is done on the cutting floor, to the hogs?

A. The hogs are rolled out and go down the trim or the cutting table the head is taken, and the loins, the butts and the picnics, on the right side of the table the first boy takes out the spare-ribs, the next boy trims the belly, the next one trims all of the trimming and on the left side the first boy trims the loins and the next one trims the shoulders, the next trims the legs and on the end, one boy and one girl trims all of the trimmings and that is the operation.

Q. And what happens to the beef?

A. It goes to the beef holding cooler until it is sold or boned out.

(Testimony of Len Broces.)

Q. Boned out, what do you mean?

A. What is used up in the sausage kitchen, the meat is boned out.

Q. Is that all of the trimming there is?

A. Outside of breaking out the loin and the backs, the front and hind quarters.

Q. Would you just explain that?

A. The front quarter is taken on the,——

Mr. Sullivan: ——Just a minute, this breaking down of the beef is that done in the cutting room or the trimming room? [20] A. No.

Mr. Sullivan: We object to this as being immaterial.

The Court: Overruled.

Q. What cutting or trimming is done of the beef in the cutting or trimming room?

A. Nothing except the boning out of the beef.

Q. And that is what you explained a moment ago?

A. Yes, that is done in the kitchen.

Q. When you employ a person as a hide dropper or a boner or in any of those occupations on the kill floor or the trimming room, do you specify which particular task he is to perform?

A. Yes.

Q. Do you specify which cut he is to make in performing his work or which task he is to do or just to perform his job, will you explain that?

A. I hire them to do a certain work, either they are knife men or they will work up to these knife jobs.

(Testimony of Len Broces.)

Q. When they work up to a knife job and when you employ them to perform knife jobs, do you specify which task in the knife job he is to perform?

A. Usually the foreman does that in the department.

Q. Do you explain to him exactly how he is to perform his work? A. Yes, sir.

Q. As I take it, the main tools of a knife man is his knife [21]

A. Well, the steel plays an important part.

Q. The main operating tool is the knife?

A. Well, the knife is no good without a steel.

Q. But the main tool of the knife man is a sharp knife?

A. Well, it wouldn't be a knife alone, it would not be sharp if he didn't have a steel.

Q. Well, the main tools of a knife man are the knives and steel. A. That is right.

Q. When you employ him to do a knife job, you employ him to use a knife, is that right?

A. Not always.

Q. Well, what do you employ him to use?

A. Well, of course, we hire them to wash, bone and to shroud.

Q. Beginning after a person has worked up to a knife job, then you know that he is going to use a knife or you hire him at first as a knife man?

A. That is right.

Q. A knife to be of any practical value in a knife job has to be a sharp knife?

(Testimony of Len Broces.)

A. Yes, sir.

Q. And it has to be sharpened by the Company or by the employee?

A. That is right.

Q. It is the practice of the King Packing Company to have the employees do that. [22]

Mr. Sullivan: I think there is no cause to lead this witness and I object to this as leading.

Mr. Scott: I am calling him under Rule 41.

Mr. Sullivan: On what grounds?

Mr. Scott: That he is an official of the Defendant Company.

The Court: The Court is not going to be misled by any leading question that might be asked, go ahead with the examination.

Q. What is the practice of the King Packing Company as to sharpening knives?

A. It has been the custom to sharpen them, that is, their own knives and Company knives but we have told them they could sharpen Company knives on Company time.

Q. In either event the employee sharpens the knives? A. That is right.

Q. When you hire a man as a knife man you know that he will be required to sharpen his knives?

A. That is right.

Q. Could a knife man properly perform his work without a sharp knife? A. No.

Q. Would you say that a sharp knife is necessary to the proper performance of a knife man's work? A. Yes, sir.

(Testimony of Len Broces.)

Q. Would you say that a sharp knife is indispensible [23] to the knife man's work?

A. How do you mean that?

Q. It is indispensible in the sense that he could not do the work properly without a sharp knife?

A. No.

Q. You mean that he must have one?

A. Unless he had a sharp knife he couldn't do a good enough job.

Q. He could not do a good enough job without a sharp knife? A. That is right.

Q. Would you say that the necessity of a sharp knife is required by the nature of the work that a knife man is performing? A. Yes.

Q. When you hire a person to perform a knife job, you expect him to do all of the tasks and to do them properly?

A. Yes, if he is going to do an operation he has to be able to do a complete job.

Q. And one of the tasks of a knife man is to sharpen his knives and to sharpen it properly?

A. Yes, sir.

Q. You expect a knife man to perform that task when you hire him to perform a knife job?

A. Yes, sir.

Q. Besides the steel, what other equipment is used in the sharpening of knives? [24]

A. A whet stone, an emery stone and a grind stone.

Q. Will you explain the use of each of those types of stones?

(Testimony of Len Broces.)

A. An emery stone and a grind stone is to put a bevel on the knife, then enough so he can finish it with the whet stone.

Q. Will you explain what you mean by a bevel?

A. From the cutting edge back up on the knife, as to the thickness of the cutting edge.

Q. When does a knife have to be beveled?

A. When it gets worn down until it is blunt.

Q. When the knife is new does it have to be beveled?

A. Most boys do bevel them, however, I have seen some that you don't have to bevel.

Q. Would you say that the main operation in the sharpening of a knife is the use of a whet stone and steel?

A. More time is put in on the steel to keep the knives sharp than is put in on the whet stone.

Q. Besides certain knives that we have identified here as furnished by the Company, what other equipment does the Company furnish for the purpose of sharpening knives.

A. I think that covers it entirely, as we stated.

Q. Does the Company furnish a knife sharpening room? A. Yes, it does.

Q. And that is located on the premises of the Defendant? A. Yes, sir. [25]

Q. That is an area that is blocked off from one corner of the trim room? A. Yes, sir.

Q. In the knife sharpening room there is a table? A. That is right.

(Testimony of Len Broces.)

Q. What are the dimensions of that table?

A. That is about three by eight feet.

Q. And what is the dimension of the knife sharpening room?

A. That is around ten by thirteen or fourteen feet, maybe just twelve, it isn't too large.

Q. Besides the table are there drawers in the knife sharpening room where the employees keep the knives at night? A. That is right.

Q. And does the Company furnish a steam well? A. Yes, sir.

Q. What part does the steam well play in the sharpening of the knives?

A. On the loin, the leg and the shoulder knives they are put in the sterilizer to keep them hot so that they will skin right through the fat,—there is a scum that gets on the knife and then when they use the steel,——

Q. ——Where is the sterilizer that you spoke of located?

A. On each one of the cutting tables.

Q. Do they use that in sharpening the knives?

A. No, but throughout the day?

Q. When they are cutting?

A. That is right.

Q. Does the Company furnish the oil?

A. Yes, the oil that is used on the stones.

Q. There is also an emery stone and a grind stone I believe you said?

A. Yes and also the heat is furnished.

Q. The Company furnishes the heat?

(Testimony of Len Broces.)

A. Yes, sir.

Q. And also the light?

A. Yes sir, the room is kept in condition that the boys can relax.

Q. You furnish the heat? A. Yes sir.

Q. Are there any windows in the knife sharpening room. A. No.

Q. Is there any ventilation there other that comes through the door?

A. Over the top there is ventilation that circulates through there.

Q. Where does it circulate, out of the trim room? A. No, over the top of the cooler.

Q. Does that bring in the fresh air or is it air from other parts of the trim room?

A. Just what air is in the plant; we have an exhaust fans on the kill floor and doors and windows where [27] the air circulates through the plant.

Q. On the kill floor and the trimming room, there is an odor peculiar to a meat packing plant?

A. A little, yes sir.

Q. Do you know whether or not that would be nauseating to a person not accustomed to the odor?

Mr. Sullivan: We object to that as being incompetent, irrelevant and immaterial to any issue here.

The Court: I have let you go a long way in this manner.

Mr. Scott: Under the United States Supreme Court Ruling one of the requirements for com-

(Testimony of Len Broces.)

pensible time is that it would be burdensome.

The Court: You are talking now about a general condition in the slaughter house,—that objection will be sustained. I think you have covered that sufficiently you may turn to something else.

Q. Now, as I understand, it is the practice of the Company for the employees to sharpen knives they own outside of the shift hours?

A. They have that right, yes sir.

Q. They have to do that don't they?

A. Their own knives, you mean?

Q. Yes. A. That has been the custom.

Q. And they also sharpen the knives of the Company outside of the shift hours? [28]

A. They can or they can sharpen them on Company time.

Q. Have you ever told them or has anyone else told them that they could sharpen Company knives on Company time?

A. Yes, I have.

Q. Do you know whether they actually sharpen them on Company time?

A. They do part of the time and part of their own.

Q. To your knowledge they sharpen both on Company time and on their own time?

A. That is right.

Q. Now, is the operation of butchering meat in the kill room and the trim room a production line activity? A. Yes, sir.

Q. On the killing floor, as to the beef, is there

(Testimony of Len Broces.)

an overhead track that the carcass slides on, going through its process on being butchered?

A. There is a track that it rolls on.

Q. An overhead track? A. Yes.

Q. And as the carcass goes down the track each employee performs a particular operation in the butchering of the carcass. A. Yes, sir.

Q. And as he finishes his operation he pushes the carcass along to the next man?

A. Part of it is that way and part is by hoist, yes sir.

Q. What do you mean part is done by hoist?

A. From the floor they reel them up and down by hoist, it is raised back from the floor on to the track by hoist.

Q. Whether it goes up or down, it is done while suspended on this track and it is moved on the track for the purpose of being butchered?

A. Yes, sir.

Q. For the purpose of the killing of hogs on the kill floor, do you have an overhead track that provides its own locomotion, that moves the carcass down past the employees?

A. We don't at the present time but we expect to have one put in right away.

Q. Do you expect that right away, do you?

A. Yes, I would say within a couple of weeks.

Q. And as the carcass passes down on this overhead track each employee will perform his job as it goes past? A. That is right.

Q. In the trimming room do you have a table

(Testimony of Len Broces.)

that has a moveable top on which the pork is placed and the top carries it past the employees?

A. That is correct.

Q. And as it goes past, each one performs his particular job? A. That is correct.

Q. Now then, of this such production line arrangement [30] would it be possible for an employee to take time out during the shift to sharpen his knives without haulting the production line, or holding up the operation?

A. We try to have a relief man in case something like that happens.

Q. Where do you get this relief man?

A. We have him on other jobs where we can easily pull him off in case something like that happens, in case one of the men has to sharpen his knife.

Q. You have to have the relief man or the whole production stops if a man took time out to sharpen his knife? A. No, they could double over.

Q. What do you mean by that?

A. Well, generally it would not go along so fast but it would not have to come to a stand-still.

Q. It would have to slow up, that is, the operation. A. Yes, a little, it would.

Q. If an employee on the kill floor tried to perform his work with a dull knife, what would be the effects?

A. He would not be able to get his job done very fast.

Q. It would slow up the production I take it?

A. Yes, sir.

(Testimony of Len Broces.)

Q. And that would increase the cost to the Company in performing that work. [31]

A. If he continued, he just couldn't keep that up, we would replace him.

Q. At the present time, what is the rate of production on the kill of beef and pork?

Mr. Sullivan: We object to that on the grounds of irrelevancy, we think that counsel has gone very far afield in this matter already.

The Court: I have permitted him to go ahead and I don't think that he should take much more time on this matter, I don't believe, under the issues here that it should take too much time to try this case. You may answer.

A. On the cattle the average is .9 to one beef per man per hour, on the hog kill at the present time that runs around three per man per hour.

Q. And what do you expect that to be with the new overhead rail? A. I don't know for sure.

Q. But you expect that it will be increased?

A. Yes, sir.

Q. Do you have any quota for the trimming or cutting?

A. Yes, it is around 6½ to 7, we don't have any fixed quota.

Q. 6½ to 7 hogs per man per hour?

A. Yes sir.

Q. Are sharp knives necessary to maintain this production rate? A. Yes, sir. [32]

Q. I take it that if the knives were dull, the production rate would fall down?

(Testimony of Len Broces.)

A. If you allowed it to continue, yes.

The Court: I think we understand all that, can you go on to some other matter?

Q. Are there any other results from dull knives besides the slowing up of the production?

A. Not that I know of.

Q. Would it affect the grading of the hide if the hide wasn't taken off properly, if it wasn't skinned properly?

A. If it wasn't skinned, that is, if the carcass was not properly skinned it would affect it, yes.

Q. It would affect the grade of the hide?

A. Yes.

Q. Is a sharp knife necessary to skin the carcass right? A. Yes sir, it is.

Q. And also, if you have a dull knife would it tend to make a ragged or uneven cut of the meat and affect the appearance of the meat?

A. Yes, sir.

Q. And if you had meat that had ragged or jagged cuts would it affect the marketability?

A. Yes sir, it would.

Q. If you have dull knives does it tend to cause accidents by knives slipping? [33]

A. No, no more than sharp knives.

Q. Would a dull knife be more apt to pull through the fiber and hit the employee?

A. I don't think so.

Q. Would a dull knife tend to tire the arm and the wrist of the employee?

A. Yes, I believe it would.

(Testimony of Len Broces.)

Q. And if the arm and the wrist would tire out, that would tend to slow down production?

A. Yes, if it continued that way, it might.

Q. Do you know whether,—I think we stipulated that the knife question discussed in the negotiation?

Mr. Sullivan: We will so stipulate.

Q. On Plaintiff's Exhibit No. 12 which contains the starting and the stopping times of the different employees, I notice that the times are staggered, is the purpose of this to permit the production line operation to continue without the employees at the end of the line having to wait around? A. That is right.

Q. Is the schedule daily hours of the employees an eight hour shift per day?

A. There is no guarantee.

Q. Though you don't have a guaranty of eight hours is that the normal daily shift?

A. Yes, it is.

Q. And what is the lunch hour? [34]

A. One hour.

Q. Is there a rest period in the afternoon?

A. Yes, at ten o'clock five minutes, and at three o'clock five minutes.

The Court: Five minutes each?

A. Yes.

Q. If an employee regularly persistent in sharpening his knife on scheduled shift hours what would you do to him?

A. We never say very much and it is being done, they slip in and sharpen a knife a little during the working hours.

(Testimony of Len Broces.)

Q. Is it contra to the announced policy of the Company? A. Yes, sir.

Q. If an employee persisted in sharpening his knife on Company time would you speak to him about it? A. Yes, sir.

Q. What would you tell him to do?

A. That he should have his knife sharpened and ready to work when his shift comes on.

Q. During the noon hour do you eat lunch at the plant or do you go home?

A. I used to for years but the last year or two I have been going home but once in a while I do eat my lunch at the plant but I mostly go home at this time.

Q. As I understand it the time clock is located on the door or near the door outside of the trimming [35] room?

A. That is correct, in the wholesale department.

Q. And what instruction have you been giving to the employees as to when they are to punch in and out?

A. They should not punch in before 15 minutes before starting time and they don't have to punch in until their time to go to work.

Q. What are the orders as to the time to punch out?

A. We try to work that on either the hour or the half hour.

Q. Do they punch out before or after?

A. They punch out after work, they wash their aprons and knives and take them out and on the

(Testimony of Len Broces.)

way out they punch the time clock.

Q. It is with the approval of the Company that they punch out after putting away the knives and washing their aprons?

A. Will you repeat that?

Q. It is with the approval of the Company that they punch out after they return the knives to the knife sharpening room and washing their aprons?

A. If they get through the work at 5 they can punch out, they can punch out then if they want.

The Court: The punching out time is not necessarily the time they quit on the job?

A. It is within a quarter of an hour.

Q. As a matter of time many of the employees punch in [36] when they pass the time clock, when they go to the sharpening room to sharpen knives?

A. A few do.

Q. But in computing the payroll the Company uses the scheduled shift time and not the time clock?

A. Both are used; if they work 16 minutes over the half hour they get paid.

Q. If the employee punched in before he sharpened his knives and that appeared on the time clock you would exclude it from the pay time for the purpose of making the payroll?

A. We usually try to, yes.

Q. Any sharpening time on the time clock is excluded in the preparation of the payroll?

A. Other than sharpening company knives, if they use them they are paid.

(Testimony of Len Broces.)

Q. All of the employees that are knife men on the kill floor or the trimming room are paid by the hour: A. That is correct.

Q. Though it would be of no advantage to the employee and it would not result in increase of his production time if he arrives early for his shift and sharpened his knives, would it?

A. You mean he would not get in any more time?

Q. He would not get in any more production time on the floor? [37]

A. Only the hours that he worked.

Q. And since an employee is paid by the hour it is no benefit for him whether the rate of production is fast or slow and if that is the result of a dull knife?

A. Yes it is a benefit to him if he wants to keep his job.

Q. But as far as his immediate take-home pay, does not benefit him whether he works fast or slow in the production line?

The Court: I think that has been answered. I don't believe you need to pursue that any further.

Mr. Scott: I believe that is all of this witness.

Cross Examination

Q. (By Mr. Sullivan): How long have you been with the King Packing Company?

A. Since 1935.

Q. What various positions have you held?

A. Well I have worked in the sausage kitchen but mostly on the kill floor, boning and cutting hogs, too.

(Testimony of Len Broces.)

Q. In the work on the killing floor and the trimming room were you a knife man?

A. Yes, sir.

Q. And you are familiar with the care and use of the knives? A. Yes, sir, I am.

Q. Since you have been with the King Packing Company since you have worked for that Company have the knife men, the employees on the killing floor and in the trim [38] room ever been compensated for the sharpening of their own knives before they actually commenced the shift in the morning?

A. I didn't quite get that, Mr. Sullivan.

Q. The killing room and the trimming room men in this place, since you have been at the King Packing Company, have they ever been paid for sharpening their own knives?

A. Only the Company knives.

Q. But not their own? A. No, sir.

Q. Where were you employed before you went with the King Packing Company?

A. At Kuna.

Q. Now where?

A. The Idaho Meat Packers.

Q. That was afterwards? A. Yes.

Q. The position at Kuna was meat packing?

A. Yes, sir.

Q. Have either of those places compensated men for sharpening their own knives prior to going to work? A. No.

Mr. Scott: We object to this, the custom of other plants does not go to any question involved in this matter.

(Testimony of Len Broces.)

The Court: Overruled.

Q. Mr. Broces, I think you testified that knife men in [39] this trimming room and killing room purchased knives from the Company?

A. They can or they can buy them wherever they want.

Q. Is there any requirement that the employee buy from the Company?

A. No, but some types are hard to get and they cannot get them anywhere handy and we handle them for our employees.

Q. Are they special knives?

A. Well they are better than the average.

Q. Do they also buy steels from the Company?

A. Yes, sir.

Q. And is there any such requirements as to the steels? A. No, sir.

Q. Why does the Company purchase and sell steels to the employees?

A. To help the boys out, they are hard to get,—you cannot pick them up just anywhere and another thing we sell them to the boys at cost.

Q. The Company makes no profit on those sales.

A. No, sir, that helps them and they also get aprons and knife pouches.

Q. Those are at cost? A. Yes, sir.

Q. When an employee buys his knife, it actually belongs to him after that? A. Yes, sir. [40]

Q. And if he leaves the employ of the Company does he take his knife or knives with him?

A. They can if they wish, yes.

(Testimony of Len Broces.)

Q. Do they, if they leave the employ of the Company?

A. You mean if they have any custom butchering to do.

Q. If they quit?

A. They take the knives with them.

Q. Can they take their knives home with them if they desire? A. Yes, sir.

Q. And do they do so? A. Yes, sir.

Q. And their knives, if they wish, they can sharpen them at home?

A. You mean the Company knives?

Q. Their personal knives.

A. Yes, they could.

Mr. Scott: We object to this as not proper examination.

The Court: The objection is overruled.

Q. And do they do that at times?

A. I have seen it done.

Q. Is there any requirement of the Company that they must sharpen their own knives in the knife sharpening room? A. No, sir.

Q. That is left entirely to the employees?

A. Yes, sir. [41]

Q. That is entirely a matter of their choice.

A. Yes, sir.

Q. I believe you testified on direct examination that each man sharpens his own knives?

A. That is correct.

Q. Is there any requirement of the Company that each man must sharpen his own knives?

(Testimony of Len Broces.)

A. No, sir.

Q. If an employee wishes another employee to sharpen his knives, is that permissible?

A. Yes, it is.

Q. Is there any control of the sharpening of the knives done by the Company?

A. No, sir.

Q. The Company has no control over that?

A. No, sir.

Q. It is left entirely to the employee?

A. Yes, sir.

Q. As a general custom of the industry or the plant there of the King Packing Company, does each man sharpen his own knives?

A. They prefer to do that.

Q. Why is that?

A. Well, they don't want anybody sharpening their knives, each seems to have a little different taste, each man takes a good deal of pride in his knife and he doesn't care for anyone to monkey with it. [42]

Q. Do they have a particular kind of edge that they like on their knives?

A. Yes, some might like it feathered, and some like it smooth.

Q. Do men sometimes trade knives?

A. Once they do trade then they shape it up the way they like it.

Q. Do men object to others using their knives?

A. Absolutely.

Q. During the shift when men are on the shift and working, do they keep their knives sharp?

(Testimony of Len Broces.)

A. Do you mean they sharpen them?

Q. Yes.

A. Some do a little and some don't.

Q. Well, what about the use of the steel?

A. Oh. They use the steel pretty near constantly.

The Court: Do they have the steel with them on the shift?

A. Yes, a knife is no good unless you have a steel.

Q. And they edge their knives on Company time? A. Yes, sir.

Q. Do men get paid for the time they spend in steeling their knives? A. That is right.

Q. Did you make an examination to determine the time spent by the men in steeling their knives during the shift times? [43]

A. Yes, sir, an average of 10.5.

Q. That is in steeling?

Mr. Scott: We object to that as not proper cross examination under any of the issues here.

The Court: I gave you a very wide range in your examination. The objection is overruled.

A. I would say around 5 tenths of a minute,—I mean five seconds.

Q. And how frequently do they steel the knives?

The Court: I would like to have this continued just a little farther and give me the practice there, I would like to know about that.

A. Yes, on the examination I determined that O. D. Rich steeled his knife five times in rumping a beef; Dick Hays steeled his knife eight times in

(Testimony of Len Broces.)

siding a beef; Glen Davis seven times in siding and Dick Kepzer steeled his knife four times in heading and scraping off the beef legs.

The Court: I believe that is sufficiently answered.

A. No matter what piece of meat they touch, they usually steel their knives before they start and if it is a long operation they steel their knives several times in between.

Q. And that is off each carcass?

A. Yes, sir.

Q. That is an example of what happens on every beef across the floor. [44]

Q. On an average of how many beefs cross the floor during the day?

A. As high as 84 in eight hours.

Q. And the average time spent on steeling a knife is about five seconds? A. Yes, sir.

Q. And all of that is done on Company time?

A. Yes, sir.

Q. You are asked about the amount of production of King Packing Company and you testified that it was nine tenths of a beef per man per hour?

A. That is it at the present time.

Q. And as to the hog kill I believe that you testified to that also? A. Yes, sir.

Q. Is there a quota system in the King Packing Company,—do the men have to meet a certain production every day? A. No, sir.

Q. There is no established production?

A. No, sir.

(Testimony of Len Broces.)

Q. And when counsel talked about a quota he was in error?

A. In that respect if he says there was a quota.

Q. And the figures that you gave is the average production you are now getting without any requirement. A. That is right.

Q. As to the use of Company knives I believe you identified them they are furnished by the Company? [45] A. Yes, sir.

Q. And they were the ones that you identified as such. A. Yes, sir.

Q. And why is it that they are furnished by the Company?

A. They are too expensive for the boys to buy, and if they should leave the job they are no good to them, they would have no use for such a knife and different ones use them.

Q. The loin knife, several men may use that?

A. That is correct.

Q. And is the same true of other Company knives?

A. Yes, it would be too expensive, if a man bought one of those knives to use than another would have to buy a set,—the knives that they use cost at the most about $1.85.

Q. All of these various kinds of knives, the spareribb knife and so forth, how many of each of these knives do you have at the plant, that is, for the operation of the plant?

A. We usually buy a dozen spareribb knives to keep on hand and also the loin knives and the

(Testimony of Len Broces.)

shoulder knives. They get worn down and we order ahead of time so we will always have some on hand. Those knives setting here on knives that are worn down.

Q. As to the loin knife, do you have one in use and when it gets worn down do you get another or do you have a half dozen in use at the time. [46]

A. Usually about two each and then they can fall back on one.

Q. Counsel has introduced Exhibit No. 12, that is the time scheduled,—is the fact that the schedule is staggered any advantage to the employees in sharpening their knives?

A. Will you repeat that question?

Q. Yes. Is the staggering of the work time as shown on the exhibit, is that of any advantage to the employees in sharpening their knives?

A. Yes, if they were all to come at once there would not be room at the present time for them to sharpen their knives, there is not enough room for all of them at one time.

Q. Counsel has identified this room and inquired about it, and about the general custom among the men in the process of sharpening their knives; is there any discipline exerted by the Company in that regard? A. Absolutely not.

Q. What is the custom there?

A. Well, they are free to smoke and to visit or anything that they want to do while sharpening their knives. We have no say-so, they can take all the time they want to in sharpening their knives.

(Testimony of Len Broces.)

Q. You mentioned rest period in the morning and in the afternoon; are the men free at any time they desire to leave the job for personal reasons such as going [47] to the bathroom or using the telephone or things like that?

A. Yes, they are free to do that.

Q. And you mentioned on direct examination that there was a lee-way so far as starting time was concerned, I believe you said that it was 17 minutes,—if a man was not more than 17 minutes late then he gets full credit for the shift?

A. That is right but I believe I said 16 minutes.

The Court: You mean that he is given full credit for what?

A. Credit for the hour, if he is late for work we don't dock him unless he is 16 minutes to 20 minutes late.

Q. If a man was supposed to start at 7:30 and he came in a little bit late and spent five or six minutes sharpening his knife and he didn't get through until a minute or two late that would be on the Company time? A. Yes, sir.

Q. And is there anything said about that?

A. We don't say anything about that as long as it does not get to be a habit.

The Court: But, of course, you don't encourage that?

A. You mean being late?

The Court: Yes, coming on the floor late because they were sharpening their knives.

A. No, sir, we don't encourage it. [48]

(Testimony of Len Broces.)

The Court: But you don't care if they take extra time to sharpen their knives if it is not on Company time?

A. No, sir.

Q. Who sharpens the Company knives?

A. The boys that are going to do that job generally like to do the sharpening.

Q. If an employee is going to use that knife he sharpens it, is that right?

A. That is right, he doesn't want someone to do the sharpening.

Q. And these knives are sharpened on Company time?

A. They can if they wish to do that, yes.

Q. But sometimes they don't?

A. No, some of the time they sharpen them with their own knives.

Q. That is up to the employee?

A. That is right.

Q. You mentioned on direct examination that the employees are paid by the hour.

A. That is right.

Q. On an eight-hour day?

A. That is right, yes, sir.

Q. Is there any incentive system that gives the kill over the quota they get additional pay?

A. No, sir, there is no quota set.

Q. Is there any piece work? [49]

A. No, sir.

Q. In connection with the time spent in sharpening knives, before they go on shift, before they

(Testimony of Len Broces.)

start work in the morning, did you ever make any study of the time spent on that? A. Yes, sir.

Q. Over a period of how many days was this study made?

A. Well, here is some made on 4-10 and 12 and,——

Q. ——Just give the number of days.

A. There were 14 different days.

Q. And what was the average time spent by the employees in the knife sharpening room, sharpening their knives? A. 10.4.

Q. What is that, minutes?

A. Yes, sir, 10.4 minutes.

Q. Did that include the time spent in sharpening the Company knives?

A. Yes, sir, some of it was.

Q. Will the time spent by the employees sharpening knives vary from man to man?

A. Yes, the better butchers sharpen their knives in as little as three minutes and on down to the poor knife man and he takes as long as 20 minutes or a half hour.

Q. Then it is a question of experience?

A. That is right.

Q. You say that that is the actual time spent?

A. That is the actual time.

Q. That includes the time visiting and smoking?

A. That is when they start up to when they put the knives in the knife pouch, that is when I stopped.

Q. That includes all of the time spent?

(Testimony of Len Broces.)

A. That is right.

Q. I believe you mentioned that at the time some of the men were employed first that they are not on the knife jobs? A. That is right.

Q. But I believe you said that they may graduate into the knife jobs? A. Yes, sir.

Q. When they start in on a knife job are any instructions given as to the sharpening of knives, as to how or when he is to do that work?

A. No, sir, if they ask I or someone of the other boys or possibly the foreman tries to show them how they sharpen their knives but you won't find two men that sharpen knives alike.

Q. When an employee starts as a knife man he isn't told to sharpen his knives?

A. No, sir, that is up to him.

Q. It is up to him to keep a certain edge on his knife and he is not told about that?

A. No, sir, he is not told.

Q. He is given no instructions about sharpening knives? [51] A. No, sir.

Q. Is he told when he is to sharpen his knives?

A. I have told them that I would like to have them sharpened before they went to work.

Q. But you didn't tell them it was to be in the morning or the evening?

A. No, sir, I never did.

Q. The knife is their own tool and it is up to them to keep the knife in condition?

A. That is correct.

Q. Would it be a satisfactory arrangement, in

(Testimony of Len Broces.)

your opinion, with the men, the knife men if a man was hired by the Company to sharpen all of these knives? A. You say would it be satisfactory?

Q. Yes, would it be satisfactory with the knife men?

A. The men wouldn't care for that; they like to sharpen their own knives. If that was forced upon them some would sharpen their own knives on their own time anyway. They would do that rather than let someone else sharpen them for them.

Q. If an employee on the killing floor or in the trimming room is inexperienced or lazy or for any reason not properly doing his job, what effect would it have on the rest of the men?

A. You mean if that condition continued?

Q. Yes.

A. Well, I guess the rest of them would figure that he [52] might be getting away with it, I wonder why couldn't I.

Q. Would it slow down the entire production?

A. Yes, you have to treat the entire bunch fair.

Q. I don't know if I went into this matter fully; these knives that the men purchase and use, their own knives, did you say that they used them for other purposes than work in the King Packing Company plant?

A. They have the privilege to do that, some of them take their knives home with them to do some butchering, some custom work or they can take them and do anything they want.

The Court: Is that frequently done by the employees?

(Testimony of Len Broces.)

A. It is done quite often, not a great deal but it is done, different ones want to use their knives to do some custom work or to take them home and use them in some way, it is their own business.

Q. Now the whet stones, are they owned by the men themselves?

A. The whet stones are, yes, sir.

Q. Where do they get them?

A. Anywhere they want.

Q. The Company doesn't handle those?

A. No, because they boys like to get various kinds. There are different numbers, some are fine, some medium and some course and they like to pick them out themselves. [53]

Q. Are they readily available?

A. Yes, they are.

Q. In the various stores? A. Yes, sir.

Mr. Sullivan: I believe that is all.

Redirect Examination

Q. (By Mr. Scott): The Company would not permit the boys to take Company knives home, would they?

A. We have let them if they want to borrow a saw or a cleaver or something like that, we have let them take those things home, yes.

Q. They have to get permission from the Company to take Company tools home?

A. Yes, sir.

Q. You stated that if an employee was 15 minutes late that he is not docked for that time, I believe you said unless it became a habit?

(Testimony of Len Broces.)

A. That is right.

Q. It would not take very many times before it became a habit in the opinion of the Company?

A. No, sir, it would not take very many.

Q. What is the prevalent practice as to whether the Company knives are sharpened on Company time or on the employees' time?

A. You mean how do they do it.

Q. Yes, as actually practiced, do they sharpen them on [54] Company time or on their own?

A. Some during working hours and some on their own time.

Q. The great majority sharpen the Company knives on Company time?

A. I expect that a little more on their own than on Company time but it is up to them, they have the privilege of doing it on Company time.

Q. Have you ever criticized an employee for sharpening Company knives on Company time?

A. No, sir, I have not.

Q. To clear up the record, what I called a quota, that is the actual rate of production at the present time?

A. You mean that is what we are doing now.

Q. Yes, with that matter cleared up in the record, calling it the production rate, that would be slowed down if proper and sharp knives were not used by the employees? A. Yes, sir.

Q. What did you say was the time devoted to sharpening knives according to the study made, was that from 3 minutes to 20 minutes?

(Testimony of Len Broces.)

A. That depends on the man, if someone doesn't know how it takes a long time but others do it very fast.

Q. But the employee that takes 20 minutes, he is trying just as hard as he can during the entire 20 minutes? A. Yes, sir, he is.

Q. When you say it takes 3 to 20 minutes you are talking [55] about one knife?

A. Yes, sir.

Q. And ordinarily an employee uses three or four knives?

A. That depends on how good a butcher he is.

Q. What is the ordinary number of knives that he sharpens in the morning? A. Two to four.

Q. When you say a person sharpens two, is that two of his own or some Company knives or two together?

A. There are only about six that use Company knives.

Q. These employees that use the four knives, that would mean 12 minutes that they would take?

A. Yes, sir, if they need that many knives, personally I cannot see that they need that many.

Q. Three minutes is the best time that you have in the time study, per knife?

A. Yes, I think it is.

Q. Now, I think you testified that this knife sharpening room is rather small?

A. Yes, sir.

Q. When you made this study, were you inside of this knife sharpening room?

(Testimony of Len Broces.)

A. Yes, sir, absolutely.

Q. Did the employees see you there?

A. Yes, sir.

Q. Was there any basis on which you made that study, was there any preconceived basis or system?

A. No, if I came in and I had a chance to get a fair check, I did it and if I couldn't then I would let it go to some other time.

Q. Suppose as you studied a person sharpening all of his knives in four minutes, would you know whether he was sharpening a complete set for the day or would he have to sharpen some during the noon hour?

A. Will you state that again?

Q. Yes, if you saw an employee take four minutes as a total to sharpen his knives, would you know whether he sharpened a complete set or a partial set and that he had to do some further sharpening during the recess period or the noon hour?

A. Yes, I saw how many knives he sharpened.

Q. Did an employee always sharpen a full set according to your figures?

Mr. Sullivan: We object to that, the witness has stated the time consumed.

The Court: If the witness understands the question he may answer.

A. A full set depends on the job he is going to do, if it is a double header, beef and pork, that would take more knives than if it was just one and then it would take less.

(Testimony of Lee Broces.)

Q. A double header is when they butcher beef and pork, and then an employee has to sharpen two sets of knives? A. As a rule, yes, sir. [57]

Q. And on a single you would take less?

A. We are putting in the chain for the reason that we will kill only one in a day.

Q. Do you know whether employees sharpen their knives during the noon hour?

A. Yes, sir.

Q. For the last year or so you have been going home to lunch? A. That is right.

Q. So the time study cannot be made at noon?

A. Yes, sir, at that time I took my lunch, this was in April, 1951.

Q. You were taking your lunch to the plant?

A. In April, 1951, yes, sir.

Q. And the time check included any time during the noon hour, used in sharpening knives?

A. Yes, sir, some of it was, not very much but some was during the noon hour after they ate lunch they would come down and probably dress up a knife or knives.

Q. Are there some employees that come early in the morning and do other work, hang up meat or some other duties and sharpen their knives at the end of the shift?

A. That is their privilege.

Q. As an actual matter of fact do some of the employees sharpen their knives at the end of the shift? A. Some do, yes, sir.

Q. And did the time study include any time at the end of [58] the shift?

(Testimony of Len Broces.)

A. Yes, one or two of them.

Q. But for the most part the sharpening at the end of the shift and at noon was pretty sketchy?

A. The best butchers, if they sharpen their knives in the morning you don't see them there at noon or after the shift.

Q. Your time study when you made it in 1951, the same employees are not there at the present time, in the knife operations?

A. I think they are there, they are working there yet, we do have some at new ones.

Q. Your time study would not include time devoted by employees since April or May of 1951?

A. Our new ones are not using knives. Glen Dennis is the last knife man we hired and his record is here.

Q. A little while ago you spoke about the custom in sharpening knives, do you know the custom as to the so-called big four packing plants as to sharpening knives?

Mr. Sullivan: We object to that as being entirely incompetent, irrelevant and immaterial as to what the custom was or is at the big four.

The Court: I am not sure I know what you mean by the big four and I don't know that it is material but you may answer.

A. I would rather leave that to Mr. Anderson; he has been [59] around and he knows more than I do.

Q. Actually you don't know about the custom in the industry?

(Testimony of Len Broces.)

A. I do in the Northwest, outside of that I cannot tell you.

Q. The Northwest, would that extend farther than the state of Idaho?

A. Yes, Idaho, Washington and Oregon.

Q. Outside of those three States you are not familiar with the custom of paying or not paying for knife sharpening time? A. No, sir.

Q. In the trimming room, as I understand the operation in the trimming room that is cutting away from the bone?

A. Yes, on the beef it is boning, but not the pork trimming.

Q. The sharper the knives the better the meat can be cut off the bone?

A. Well, it is easier for the man who does it.

Q. You could get more meat off the bone with a sharp knife? A. That is true.

Q. Then it is self evident that the cleaner you get the bone the more profitable it is for the Company in its operation? A. Yes, sir. [60]

Q. Now, in regard to taking these knives home at night and sharpening them, do you know anybody that does that?

A. I cannot say anybody at this time but it has been done, I do know that.

Q. So far as you know it would be an unusual circumstance for an employee to take his knife home at night and sharpen it?

Mr. Sullivan: We object to that as being incompetent, irrelevant and immaterial. The witness has

(Testimony of Len Broces.)

testified that they were privileged to do that if they wanted to.

The Court: Overruled, he may answer.

Q. Let me ask you this way, would it be extraordinary or rather extraordinary for an employee to take his knife home to sharpen it regularly?

A. I have seen them do it, I have done if I wanted to do something with the knife.

Q. But it would be extraordinary?

A. Yes, it doesn't take long to sharpen it, you could sharpen it while you are fooling around wrapping it up.

Q. Then it is not the practice to take the knives home to sharpen them?

A. No, sir, it is not the practice.

Q. In regards as to whether an employee sharpens another [61] employee's knife that is a personal matter between the employees?

A. That is right.

Q. What one employee might consider a sharp edge another consider dull?

A. Yes, sir, that is right.

Q. Though it would create dissatisfaction among the employees or another to sharpen their knives?

A. Yes, sir.

Q. In regard to using the steel, you said that they spend about 5 seconds in each minute in the use of the steel? A. No, not in each minute.

Q. Then what was that answer?

A. I said about 5 seconds every time they steeled their knives. They steel their knife every time they take a piece of meat and trim it.

(Testimony of Len Broces.)

Q. They steel their knives throughout the day?

A. Yes, sir.

Q. They spend a great deal of time steeling their knives than in sharpening them in the morning? A. That is right.

Q. And the Company pays for that steeling?

A. Yes, sir.

Q. That runs how much time during the day?

A. I haven't it right here but I could figure it.

Q. It would not be less than half an hour that they would spend steeling their knives? [62]

A. I would be guessing but if you run 90 head and you would steel 5 times for every one that goes through to each man, that runs quite a lot of time.

Q. They spend a lot more time in steeling than in sharpening in the morning?

A. Yes, sir, that is right.

Q. And you say that the Company pays them for the steeling time? A. That is right.

Q. And they have no objection to that?

A. No.

Q. If an employee wants to sharpen the Company knives, the Company pays for that?

A. Yes, sir.

Q. And the employees have been told that?

A. Yes, sir.

Q. If a knife becomes dull during the shift the employee can go and sharpen that knife?

A. They can and they do.

Q. And the Company has no objection to that?

A. As long as it doesn't get to be an extreme.

(Testimony of Len Broces.)

Q. If an employee didn't sharpen a full set of knives before he began so that he would have to stop several times to sharpen those knives that would be extreme? A. Yes, sir.

Q. And the Company would object to that?

A. Yes, sir. [63]

Q. If he has a full set of knives sharpened before the shift and if during the shift the knives become dull, he is permitted to sharpen the knives on Company time?

A. We do allow that, yes, but usually they last him thru the day unless he drops a knife or it hits against metal.

Q. If they drop their knives or if it hits against some metal you would recognize that they would have to sharpen their knives? A. Yes, sir.

Q. And the Company would pay for that?

A. Yes, sir.

Q. And the Company would have no objection to that? A. Yes, sir.

Q. But the Company does object to sharpening on the whetstone at the beginning of the shift in the morning, is that right?

A. Was that question in the morning.

Q. The Company does object to the time spent in the morning putting knives on the whetstones?

A. Yes, sir.

Mr. Sullivan: We object to that,—let me ask did you say that they object to paying for it, is that what you meant?

The Court: I think I understand what they

(Testimony of Len Broces.)

mean, you are not conducting a kindergarten here, you may proceed.

Q. So far as the procedure of recording the time devoted to knife sharpening, the Company could vary that time? [64] A. Yes, sir.

Q. If the Company didn't want the employees to come in at different times the Company could tell them all to start sharpening their knives and give them five or ten minutes or whatever time it took to sharpen their knives?

A. I think it would interfere with the day's work.

Q. That is just the point, the only objection the Company would have after the shift began is that it would cut down down on the Company production? A. That is right.

Q. As an administrative matter, the Company could record this morning knife sharpening time for the purpose of paying for it?

A. They could, I suppose.

Q. Upon the killing floor the general causes that dull knives are cutting through hair and cutting through dirt and the hide and hitting bones?

A. That does dull them.

Q. Depending on the condition of the animal, condition of the dirt, and so on, some knives last longer than others? A. Yes, sir.

Q. And on the trim floor the general causes of dulling knives aret the hitting of bones as they go through the pork?

A. Well, maybe, to a certain extent.

(Testimony of Len Broces.)

Q. Also the mere cutting of the meat dulls the knives? A. It does some, yes, sir. [65]

Q. Even on the trim floor the time that a knife would remain sharp would depend on the number of times that they hit bone?

A. You mean ordinarily.

Q. Yes.

A. In the ordinary use of a knife and a steel, if it is sharp to start with under normal conditions it will last all day.

Q. But the hitting of a bone in the trimming process does tend to dull a knife? A. Sure.

Mr. Scott: I think that is all.

Recross Examination

Q. (By Mr. Sullivan): You mentioned this chain or track that is being installed, that was brought by the Government, that meant only one type of animal would be butchered in a day?

A. That is right.

Q. That would mean less knives to sharpen?

A. Yes sir.

Q. And that would immediately,—or rather materially reduce the time required in sharpening knives before going on shift? A. Yes sir.

Q. Perhaps one-half of the time?

A. Yes sir, it should. [66]

Q. If a man at the end of the shift, after he goes off shift, if he sharpens his knives, is it necessary to sharpen them in the morning again?

A. No.

Q. Once they put an edge on a knife with the

(Testimony of Len Broces.)

whetstone once a day is enough if it is cared for?

A. Yes sir.

The Court: Do I understand that the company is putting in a new chain or track.

A. Yes sir.

The Court: That is for the purpose of having one kind of livestock killed a day.

A. Yes sir, we are expanding enough to kill one kind a day, the chain takes a hog alongside of the boys to butcher it and it is not necessary to push it along all the time.

The Court: You would not then be killing beef and pork the same day.

A. Very little, if any.

The Court: When do you expect to have them completed.

A. Within a couple of weeks. [67]

* * * * *

EUGENE LOBUSOHR

Called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Scott): Where are you employed?

A. The King Packing Company at Nampa, Idaho.

Q. In what capacity?

A. Journeyman butcher.

Q. Are you killing floor? A. Yes sir.

Q. What particular job do you perform on the killing floor?

(Testimony of Eugene Lobusohr.)

A. Rumping cattle and gutting hogs.

Q. How long have you done that work for the King Packing Co.?

A. I have rumped for possibly three months and previous I was siding cattle. [68]

Q. How long had you been siding cattle?

A. About eighteen months.

Q. How long had you been working on hogs?

A. With short exceptions, three years.

Q. All together have you had a knife job at the King Packing Company?

A. About three and a half years.

Q. How long have you been a journeyman butcher? A. About eighteen months.

Q. Prior to the time you went to the King Packing Co. were you engaged in butchering livestock?

A. No sir.

Q. When you pass the time clock which is in the wholesale department on the way in in the morning, do you punch in then or later?

A. I punch in then.

Q. And what do you do then?

A. I get my knives and apron and put them on and go to work.

Q. Then you walk into the trimming room and go to the knife sharpening room? A. Yes, sir.

Q. What do you do then?

A. Get the knives and apron and go to work.

Q. Where are the knives? A. In my drawer.

Q. Do you have a drawer assigned to you? [69]

A. No, I take one that is empty.

(Testimony of Eugene Lobusohr.)

Q. There several drawers? A. Yes, sir.

Q. Those drawers are available for keeping knives? A. Yes, sir.

Q. And that is where you choose one and keep using that drawer? A. Yes sir.

Q. After you get the apron and knives what do you do?

A. I go on the killing floor and go to work.

Q. Don't you sharpen your knives?

A. No, I sharpen mine at noon.

Q. At what time does that shift begin?

A. About 7:00 in the morning.

Q. And when does it end at night?

A. At four o'clock.

Q. What time do you arrive there in the morning? A. About 6:45.

Q. About what time would it be that you pass the time clock and check in?

A. Two or three minutes to seven.

Q. Do you continue butchering until the noon hour? A. Yes sir.

Q. And what is your noon hour?

A. Ordinarily about twelve until one.

Q. During the noon hour do you engage in knife sharpening activity? [70]

A. That is when I sharpen my knives.

Q. Do you return to the knife sharpening room to sharpen your knives? A. Yes sir.

Q. And do you sharpen only at noon or at other times?

A. If I get through a few minutes earlier I

(Testimony of Eugene Lobusohr.)

might touch a knife up that I think is not quite in shape at noon but my principal time that I do my sharpening of the knives is at noon.

Q. Do you eat first at noon or do you go to sharpen your knives? A. I eat first.

Q. How many knives do you sharpen?

A. Four or five.

Q. Do you do that at noon? A. Yes sir.

Q. And what are the various types of knives that you sharpen?

A. Skinning knives; legging knives and sheep knives.

Q. Those are what have been introduced as Plaintiff's Exhibits No. Two and Five?

A. Yes sir.

Q. How many of those do you sharpen?

A. Four or five.

Q. How long does it take you to sharpen those knives properly?

A. About 20 minutes a day.

Q. And during the 20 minutes you sharpen those are you [71] sharpening them diligently or do you just work easily along?

A. I work at it very diligently.

Q. Has any official of the Company seen you sharpen those knives at noon?

A. Not to my knowledge.

Q. Do they know that you sharpen your own knives at noon?

A. I think they do, yes sir.

Q. Has Mr. Brockes an office behind the knife

(Testimony of Eugene Lobusohr.)

sharpening room that you have to pass through to get to? A. Will you say that again?

Q. Does Mr. Brockes have an office behind the knife sharpening room so that you have to pass through the knife sharpening to get to the office?

A. I wouldn't know whose office it is but I think there are a number of the foremen go in there.

Q. Is the office behind the knife sharpening room that you have to pass through the knife room to get to the office? A. Yes sir.

Q. And that is used by the foremen?

A. Yes sir.

Q. If any foreman passed through that room at noon he would see you there?

A. Yes sir, that is right.

Q. I will ask you to identify Exhibit No. 13?

A. That is one of my old skinning knives. [72]

Q. How long would it take to wear a knife down that much?

A. I think about five months.

Q. Would you give us the original dimensions of that knife when it was new?

A. Well the blade started out just as wide as this handle and it extended almost straight from his handle out to its tip I think and had a rather large belly in it.

Q. That knife has been ground in the course of knife sharpening and activity?

A. That is right.

Q. You say that you take 20 minutes to sharpen

(Testimony of Eugene Lobusohr.)

knives? A. Yes sir.

Q. And is it true that occasionally it might be that you would take less than 20 minutes?

A. Yes sir.

Q. When you take less than 20 minutes would you sharpen up your knives properly?

A. Yes sir, it would be because that I didn't need to put quite so much work on my knives that day.

Q. On an ordinary day you would take 20 minutes or would it be less than 20 minutes?

A. Ordinarily I take 20 minutes.

Q. And does that 20 minutes include only the time you spend sharpening the knives on the whetstone or does that include other work such as beveling? A. That includes the beveling time.

Q. How often do you bevel your knives? [73]

A. It depends on how often I use it during the week. I would say between once and twice a week.

Q. How long does the beveling operation take you? A. Approximately five minutes.

Q. And your answer of 20 minutes of knife sharpening time would be the average throughout the week? A. That is right.

Mr. Scott: We offer in evidence Plaintiff's Exhibit No. 13.

Mr. Sullivan: We have no objection.

The Court: It may be admitted.

Q. Do you sharpen each knife that you use at least once a day? A. Yes sir.

(Testimony of Eugene Lobusohr.)

Q. A knife could not be used more than one day without being sharpened?

A. Very rarely.

Q. You furnish all of your knives?

A. Yes sir.

Q. That is, you don't use any of the Company knives? A. No sir.

Q. During the course of the day are you constantly touching your knives up with the steel?

A. Yes sir.

Q. And does it happen that you have to touch up your knives with a whetstone occasionally?

A. I have done it about a half dozen times during the [74] time that I have been there.

Q. And you did that touching up with the whetstone on Company time? A. Yes sir.

Q. Can you use a dull knife and properly perform your work? A. No sir.

Q. Would you say that a sharp knife is an essential and indispensable tool in doing your work?

A. Will you repeat that?

Q. Yes, would you say that a sharp knife is essential and indispensable to doing your work properly? A. Yes, it is.

Q. And if you didn't have a sharp knife what would be the result?

A. It would slow you down and it would slow those depending on you to do their job, it would destroy some of the quality, in the case of cattle, both the hide and the meat and destroy the quality of the meat in the hogs. It would be dangerous

(Testimony of Eugene Lobusohr.)

to you and to the ones that you work with.

Q. Will you explain that?

A. Well when you use a dull knife you use more pressure than with a sharp knife and in using more pressure you don't know where it is going to stop or to start. Should it start too quickly you might get someone else or you might get yourself. [75]

Q. What do you mean by you might get someone else or yourself?

A. You may cut them or yourself.

Q. Is there anything else that might occur from using a dull knife?

A. No sir, I don't believe so.

Q. Would a dull knife tend to tire out the arm and the wrist? A. Yes sir, it would.

Q. And would that cause you to slow down the rate of production? A. Yes sir, it would.

Q. And is this assembly line operation of butchering, if one man slows down, he slows the whole assembly line, is that right?

A. That is right.

Q. Have you ever not sharpened your knives during the noon hour and sharpened them on the shift and been criticized for it?

A. I have been told that I should have them sharpened when I started the day's work.

Q. Who told you that? A. Mr. Brockes.

Q. And when the firm hired you was anything said as to when you should have your knives sharpened? A. No sir.

(Testimony of Eugene Lobusohr.)

Q. Had you worked in the King Packing Company in other [76] jobs before you had a knife job?

A. Yes sir.

Q. And you knew the practice without having to be told?

A. Yes, that is right.

Q. Do you recall last March or April, that would be in 1951, that a time study was made of knife sharpening in the room?

A. I never saw it, I just heard of it.

Q. And if that time study was made by Mr. Brockes he would have to be in the room, would he not?

A. Yes sir.

Q. And do you think that you would have recognized that the time study was being made by Mr. Brockes in the knife sharpening room if you had seen him?

A. Yes sir, I think so.

Q. Did you ever or do you ever sharpen your knives during the recess period in the morning or the afternoon?

A. No sir.

Q. During the time that you have been in the knife sharpening room sharpening knives have any officials come in and giving you any instructions as to performing your work that day?

A. Yes sir.

Q. And what is the name of the official giving you such instructions?

A. Mr. Brockes and Mr. Rich.

Q. What was the nature of the instructions given you at that time? [77]

A. If I am for some reason the kill to be changed in the morning and I had not been told previously,

(Testimony of Eugene Lobusohr.)

I would be told at that time of the change in the kill.

Q. You stated that you didn't know whether any official,—strike that please,—you were asked whether any official had seen you or you had seen any official of the Company in the sharpening room during the time you were sharpening knives, in view of the fact that you had been given instructions during that time, would your answer to that question that no official saw you?

A. It is still the same, most of the instructions were given in the morning, any time that I was given instructions.

Q. I asked if any official had seen you sharpening your knives and now you say that you had been given instructions when you were there during the lunch hour?

A. No, they were not given in the lunch hour.

Q. The instructions that you mentioned were not given you during the noon hour?

A. That is right.

Q. Did you ever take your knives home at night?

A. I have on two or three times.

Q. That was during a period of how long?

A. Ever since I have been there, that is about three and a half years.

Q. You have taken them home two or three times? [78] A. Yes sir.

Q. What was the purpose of taking your knives home on any of those instances?

(Testimony of Eugene Lobusohr.)

A. To butcher, some custom butchering and at one time I worked at another plant for a few days.

Q. How many times have you butchered custom beef during the time that you worked for the King Packing Company?

A. I suppose about three heads.

Q. Could you take your knives home regularly to sharpen them as a practical matter?

A. No sir.

Q. And why is your answer to that question no?

A. Well it would be difficult to bring the knives back to work and keep them sharp enough to do a day's work.

Q. The knives would become dull during the process of carrying them back?

A. That is right.

Q. Also, let me ask this, does the Company often change the kill during the course of the day and switch from beef to hogs or vice-versa?

A. They do.

Q. And often do you not know of that switch until the time it is made? A. That is right.

Q. If you took the knives home to sharpen them would you be able to have two sets available to take care of any switch?

A. Not without before-hand knowledge of the kill. [79]

Q. And sometimes you don't get information until you are asked to go to work on the switch?

(Testimony of Eugene Lobusohr.)

A. That is right.

Q. Do you think there would be any danger involved in taking the knives home and carrying them back? A. Yes sir, there would be.

Q. Do you have the necessary equipment to take your knives home at night?

A. No, I don't.

Q. Now, when you are sharpening your knives for a double header or a single header is there any difference in the amount of time required to sharpen the knives? A. For each knife, no.

Q. The total length of time required, is there any difference in the time required to sharpen the knives for a double header or a single header?

A. No sir.

Q. Will you explain why there is no difference?

A. Well, you use a knife so many hours a day no matter what you are killing; if you kill cattle in the morning you have to sharpen your knives at noon even if it is the same product that you are killing in the afternoon.

Q. You sharpen your knives at noon?

A. Yes.

Q. If you have a double header you sharpen the same number of knives? [80]

A. On each knife it takes the same length of time and you sharpen the same knives twice but on a double header you sharpen two sets of knives.

Q. On a double header you sharpen all the knives at the same time? A. Yes.

Q. Spending the same amount of time?

(Testimony of Eugene Lobusohr.)

A. Yes, sir.

Q. On a single header you sharpen the knives once again during the course of the day?

A. Yes sir.

Q. When the Defendant Company finishes the construction of this new over-head rail on the hog killing floor so that you have single headers that will not cut down the time required to sharpen knives? A. No sir, it won't.

Q. Now, at night what is the process of checking out and putting the knives away?

A. We wash up on the killing floor and put the knives and aprons away in the knife room and punch out going to the dressing room.

Q. This knife sharpening room is an area bordered off in a corner of the trimming or the cutting room? A. That is right.

Q. The walls of the knife sharpening room extend to the ceiling?

A. That is right, I believe there is an opening over two [81] of the walls from the cooler or from a dead air space.

Q. There are no windows in that room?

A. No sir.

Q. And all of the odors of the packing plant come to the knife sharpening room.

Mr. Sullivan: We object to this, it is the same question to which an objection was made and sustained.

The Court: You may go ahead to a limited extent on this examination.

(Testimony of Eugene Lobusohr.)

Q. Do all of the usual odors and smells of the meat packing plant enter into the knife sharpening room? A. They do.

The Court: Are those odors any worse in the knife sharpening room than they are on the floor of the slaughter room? A. No sir.

The Court: And you are subject to the same odors wherever you are, in the plant?

A. That is right.

Q. Can you describe the condition of the floor in the knife sharpening room?

A. The floor is usually covered with oil that is spilled and the top of the table has a dirty cloth or shroud on it.

Q. Is the oil enough to slip around with your feet? A. Enough oil to slide on.

Q. That is oil that is put on the whetstone to sharpen [82] knives? A. Yes sir.

Q. Do you know of any accidents happening in the knife sharpening room?

A. I know of a man that broke his leg.

Q. Do you know what caused him to break his leg?

A. He slipped on the floor and fell.

Q. Was he engaged in sharpening a knife at that time?

A. Either that or he was going in.

Q. Have you ever cut yourself in the course of the knife sharpening?

Mr. Sullivan: We object to that, that certainly is not an issue in this case, whether he is com-

(Testimony of Eugene Lobusohr.)

petent or not is certainly not a question here.

The Court: He may answer.

Q. Have you ever had an accident or cut yourself in knife sharpening work? A. Yes sir.

Q. Will you describe that?

A. While holding the blade my finger slipped off the blade and the tips of my fingers were cut off.

Q. How many fingers did you cut the tips off?

A. And I have also cut the tip off some fingers twice.

Q. Have you seen others cut themselves?

A. No sir.

Q. Are there any exposed steam pipes in the knife sharpening room? [83]

A. There are.

Q. How big a space is there between the exposed steam pipe and the knife sharpening table?

A. About 36 to 40 inches.

Q. If a man was sharpening his knives on that side of the table he would be standing close to a hot steam pipe? A. Yes sir, he would.

Q. Are those pipes hot enough to burn a man?

A. Yes sir, when they are on.

Q. Are there any dangers of knives falling off shelves in the room?

A. Well, those drawers are so crowded that they lay them on top.

Q. And what would or could cause them to fall off?

A. If you shut a drawer too hard or if you fall or slip against the table?

(Testimony of Eugene Lobusohr.)

Q. Have you ever had that experience?

A. Yes sir, I have closed a drawer and a knife dropped out and one time it fell off across my wrist and cut my wrist.

Q. Did you medical attention for that cut?

A. No sir.

Q. Will you state whether or not the lighting is good in that knife sharpening room?

A. It is not sufficient.

Q. Will you explain that?

A. At the present time there are two 100 watt lamps, one [84] at one end of the room and one at one side about head high.

Q. Is it difficult to see what you are doing with the lighting facilities available there?

A. It is.

Q. Does the proper sharpening of knives require the obtaining of a certain degree of skill for the task? A. It does.

Q. And does that come only by experience?

A. Yes sir.

Q. Would you say that the sharpening of knives require the exercise of skill? A. It does.

Q. If it was not for the fact that you have to have sharp knives to perform your work would you be in the knife sharpening room during the noon hour sharpening your knives?

A. No sir.

Q. Can you think of any convenience to you in having these sharp knives other than the performance of your work? A. No sir.

(Testimony of Eugene Lobusohr.)

Q. And could you properly perform the work that the Defendant pays you for if you did not have a sharp knife? A. No sir.

Mr. Scott: I believe that is all.

Cross Examination

* * * * * [85]

Q. (By Mr. Sullivan): You keep your knives in one only of the drawers? A. Yes sir.

Q. Is that to be your own choice?

A. Yes sir.

Q. There is no Company rule or any rule or requirement that you must keep them in there?

A. That is right.

Q. At the time that you went to work for the King Packing Company as a knife man did you understand at that time that you were to furnish your own knives? A. Yes, sir.

Q. And where did you get your knives?

A. I bought most of them through the Company.

Q. Were those provided to be purchased by the Company, [86] that is purchased by the men from the Company for the convenience of the men. In other words, if you want to buy them somewhere else could you do that?

A. Yes sir.

Q. How long have you been sharpening your knives during the noon hour?

A. About two years.

Q. Before that when did you sharpen your knives?

(Testimony of Eugene Lobusohr.)

A. Either in the morning or the evening whichever was convenient.

Q. That is a matter of your own convenience and your own choice? A. That is right.

Q. Is there a rule or a regulation that you must do it at any one time? A. No sir.

Q. You choose to do it at noon?

A. That is right.

Q. You use only knives that you own yourself?

A. That is right.

Q. This 20 minutes that has been mentioned, does that include the beveling of your knives which you say that you do once or twice a week?

A. That is right.

Q. Isn't it true that there are several ways to sharpen knives; one may use one way and one another? A. That is right. [87]

Q. And one may use more of a bevel on a knife than another? A. That is right.

Q. You use skinning and sheep knives?

A. Yes sir.

Q. You use both of those knives on cattle work?

A. Yes sir.

Q. And both on killing and gutting hogs?

A. I use two and they are sheep knives.

Q. You use two in gutting hogs?

A. Yes sir.

Q. How long does it take to bevel a knife?

A. About five minutes.

Q. And you sharpen about five a day?

A. Yes sir, between four and five.

(Testimony of Eugene Lobusohr.)

Q. That means that it takes around three minutes to sharpen one knife, not counting the beveling time? A. That would be about it.

Q. If you have a day when you are killing only hogs you sharpen four or five knives and you would only use two knives that day?

A. I would use as many as was necessary, when one dulled I would use another.

Q. If you did nothing but working on hogs you would still use four or five? A. I could.

Q. Usually do you in an ordinary day?

A. No. [88]

Q. How many? A. Two.

Q. If you used only two would you sharpen four or five?

A. Two of them and I would touch up the others.

Q. So that day you wouldn't use more than four or five minutes to sharpen them?

A. That would be the day that I usually bevel my knives.

Q. I mean outside of bevelling?

A. That is right.

Q. You say men sharpen their knives in different ways? A. Yes sir.

Q. They use an emer stone and a whetstone at different times? A. Yes sir.

Q. And the way in which a man uses those stones other than the whetstone, does that effect the life of a knife? A. Yes sir.

Q. If you use an emer stone or a grind stone,

(Testimony of Eugene Lobusohr.)

it would wear a knife away more quickly?

A. If you mis-use the stones you wear your knife down.

Q. But if you use the stone properly the knife would last just as long as if you didn't use it?

A. That is right.

Q. The way the stones are used does have something to do with it?

A. The way in which you are using the emery has nothing to do with the life of the knife.

Q. I thought you said that if it was mis-used.

A. That is right.

Q. So that it does have something to do with it?

A. Yes, it does.

Q. So the number of times the emery or grindstone have to be used has an effect?

A. Yes sir.

Q. And when you say five months is the time it takes to wear a knife out, you cannot give any general statements as to that?

A. No sir, I cannot.

Q. Your task at this time is rumping cattle and gutting hogs? A. Yes sir.

Q. On the killing floor?

A. Yes sir, with a few exceptions I have been gutting hogs for three and one half years and rumping cattle about six months.

Q. That is what you have been doing?

A. Yes sir.

Q. And in order to perform your job, it would be necessary to have proper tools?

(Testimony of Eugene Lobusohr.)

A. Yes sir.

Q. And those, you buy yourself?

A. Yes sir.

Q. On this question of the time study that was made as to how long it would take to sharpen knives, do you know whether such a study was made? [90] A. I don't know.

Q. You do not know? A. That is right.

Q. You mentioned that you took your knives home on two or three different occasions, on a couple of occasions to butcher at home and also to work in another plant? A. Yes sir.

Q. In the performance of your duty in the King Packing Company Plant?

A. That is right.

Q. Could you take those knives for such purposes as they were used at any time that you desired? A. I could.

Q. Other than work for the Defendant?

A. Yes sir.

Q. You mentioned that the sharpening of knives at home would be inconvenient because it would be inconvenient to keep the edge on the knives and carry them back? A. Yes sir.

Q. But you could do it if you wanted?

A. Yes sir.

Q. Using the tools of the sharpening room and also using the sharpening room was a convenience for you? A. Yes sir.

Q. The odors in the knife sharpening room are about the same as all through the plant? [91]

(Testimony of Eugene Lobusohr.)

A. Yes sir, that is right.

Q. On your recess time or during the recess period where do you spend that time?

A. I usually go to the dressing room for a few minutes.

Q. And are the odors about the same there?

A. No sir, it is clean.

Q. It is on the killing floor?

A. On the second floor.

Q. On the killing floor? A. Yes.

Q. You have no odors there?

A. Not for someone that is working there.

Q. You don't notice the odors so much after you work there awhile? A. That is right.

Q. They are not particularly noticeable to someone working there all of the time?

A. That is right.

Q. You testified on direct examination that the only reason to have a sharp knife was to perform your work better; is your work easier for you if your knives are sharp? A. Yes sir.

Q. Then there is a benefit to you to have a sharp knife? A. Yes sir.

Q. As you purchased these knives, if you leave the employ of the King Packing Company would you take your knives with you? [92]

A. Yes sir.

Mr. Sullivan: That is all.

Redirect Examination

Q. (By Mr. Scott): When you used to sharpen your knives in the morning or the evening would

(Testimony of Eugene Lobusohr.)

you spend the same time as you do now at noon?

A. I think I did.

Q. You stated that when you are engaged in working only on pork that you just used two knives? A. That is right.

Q. And you then stated that the next day you just have two knives that you had to sharpen completely? A. Yes sir.

Q. Your next day you would do your beveling?

A. The day I would not have so many knives to sharpen I would bevel the knives.

Q. And those days that you didn't sharpen so many knives, how long did it take to sharpen and bevel the knives?

A. It would still average 20 minutes.

Q. The same 20 minutes? A. Yes sir.

Q. You said that if you carried your knives home they would become dull through carrying them back and forth? A. That is right.

Q. In answer to Mr. Sullivan when he asked as to whether [93] this sharpening room was a convenience to you, you said it was, would you say it was more of a necessity than a convenience?

A. Necessity to keep our jobs.

Q. It is a necessity to have sharp knives to perform your work properly?

A. That is right.

Q. And you would not have sharp knives if you carried them back and forth to sharpen them at home? A. That is right.

Q. You said that if you used a dull knife it

(Testimony of Eugene Lobusohr.)

would tire you out? A. That is right.

Q. It would tire your wrist and arm?

A. Yes.

Q. And as a result of tired arms and wrists it would reduce,——

The Court: Why is it necessary to go over this again; I believe you went over this entire matter?

Mr. Scott: Then I think that is all.

Recross Examination

Q. (By Mr. Sullivan): Did you mean to say that you had to sharpen the knives in the sharpening room, that it was a necessity to keep your job?

A. It is a necessity to have sharp knives to keep our job. [94]

Q. But not in this room?

A. That is right.

Q. How many of the men sharpen their knives at noon, I mean approximately how many?

A. I don't know, but at the time I am in there possibly three or four.

Q. Is there any discipline exerted by the Company there? A. No sir.

Q. You can smoke or tell stories or anything you choose? A. That is right.

Mr. Sullivan: I believe that is all.

* * * * *

GLENN DENNIS

Called as a witness by the Plaintiff, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Scott): Mr. Dennis, are you employed as a journeyman butcher by the King Packing Company? A. I am.

Q. How long have you been so employed by the King Packing Company? [95]

A. Three years next June.

Q. Are you employed on the killing floor?

A. Yes sir.

Q. What job do you perform?

A. I skin cattle on beef days and shave hogs on hog days.

Q. How long have you been doing those tasks?

A. Ever since I have been there.

Q. When do you sharpen your knives?

A. About a quarter after seven when I punch in.

Q. When does your shift start? A. 7:30.

Q. You punch in on the time-clock in the wholesale department? A. That is right.

Q. And then you go directly to the sharpening room? A. Yes sir.

Q. Then you take your knives out of the drawers and take the whetstone out and start to sharpen your knives? A. That is right.

Q. How long a time do you spend in the morning sharpening your knives?

A. About 15 minutes.

Q. You use the whole 15 minutes?

A. Yes sir.

(Testimony of Glenn Dennis.)

Q. Do you spend any time during the day sharpening your knives? [96]

A. Approximately 10 minutes at noon.

Q. When you are sharpening your knives at noon, aren't there other employees there sharpening knives?

A. Occasionally three or four in there.

Q. Do you know whether any official of the Company has ever seen you in there sharpening knives at noon?

A. I think Mr. Brockes and possibly Mr. Rich saw me there.

Q. And then at night you put away the knives in the drawer and put away your apron and punch out? A. Yes sir.

Q. How many knives do you sharpen a day?

A. Five or six.

Q. What kind of knives are those?

A. Legging knives, skinning knives, shaving knives, and occasionally boning knives.

Q. Those are all furnished by you?

A. That is right.

Q. What has been marked as Exhibit No. 14 is a knife that you used in the performance of your work? A. Yes.

Q. Let me ask this, what has been marked as Exhibit 14, 15, and 16, are those knives that you have used in the performance of your work?

A. Yes sir.

Q. Have you ground those knives down in the

(Testimony of Glenn Dennis.)

course of sharpening them in connection with your work? [97] A. Yes sir, I have.

Mr. Scott: I want to offer Exhibit No. 14, 15, and 16.

The Court: Have they been identified?

Mr. Sullivan: I think they were identified merely as knives used.

Q. Will you identify this (indicating)?

A. That originally was a shaving knife, it was possibly two or three inches longer, that is, the blade was and it was the width of the handle and through the process of grinding it has gotten that much smaller.

Q. Now will you describe Exhibit 15?

A. That is a shaving knife and the length was also greater it is about ½ the size it was originally outside of the length and it is possibly an inch shorter than it was.

Q. Now will you describe Exhibit No. 16?

A. That is a legging knife and it is about ½ of the original size.

Mr. Scott: We now offer Exhibits 14, 15 and 16.

Mr. Sullivan: We have no objection.

The Court: They may be admitted.

Q. Would you please identify Exhibit No. 17?

A. That is my stone, my sharpening stone.

Q. Is that a whetstone? [98]

A. Yes sir.

Q. Have you used that stone in the performance of the sharpening work while you were working for the King Packing Company?

(Testimony of Glenn Dennis.)

A. Yes sir.

Q. Will you describe the original or the ordinary size of that?

A. It is eight inches long, seven-eighths of an inch thick and two inches wide when it was new, here (indicating) you can see the size of it.

Mr. Scott: We offer in evidence Exhibit No. 17.

Mr. Sullivan: No objections.

The Court: It may be admitted.

Q. Have you worn down this whetstone to its present condition as a result of the sharpening operations at the King Packing Company Plant?

A. Yes sir, I have.

Q. Over how long a period would that be?

A. Approximately six or seven months.

Q. And the knives identified as Exhibits 14, 15, and 16, how long would it take to wear them down to their present condition?

A. The legging knife possibly three months and the small shaving knife of the two, the one that is worn down the most, about six months and the other shaving knife about four and a half or five months.

Q. Now, Mr. Dennis, you stated that you spend 15 minutes [99] in the morning and 10 minutes at noon, that includes the bevelling time, does it?

A. Yes sir, but occasionally I have to bevel besides that.

Q. And what would be, on the occasion of bevelling, in excess of that time?

(Testimony of Glenn Dennis.)

A. If they all need bevelling I would need more time but if I had one or two beveled I could work it in the morning.

Q. Do you have any estimate on a weekly or a monthly basis, of how much time you do bevelling outside of the days that you testified to?

A. Well possibly 10 minutes and possibly 15 minutes a week, it might not take more than 10 minutes and it might.

Q. Is it necessary to sharpen knives at least once a day? A. Yes sir.

Q. Do you spend any time touching up knives during shift hours?

A. I touch up a knife occasionally at this time of the year, I touch it up at break time, about five minutes. The beef are very dirty at this time of the year.

Q. And all during the day are you engaged in using the steel in touching up your knives?

A. Yes sir.

Q. Is it necessary to have a sharp knife to perform your [100] work properly?

A. Yes sir.

Q. Is it indispensible?

A. I would say that it is indispensible.

Q. Do you take your knives home?

A. Only when I am through using them, if there is anything the wife can use them for I have them, yes.

Q. Do you ever engage in custom butchering?

A. Very little, only my own.

(Testimony of Glenn Dennis.)

Q. How many times have you taken your knives home to butcher for yourself?

A. I believe twice.

Q. Could you take your knives home if you desired?

A. I could, but I don't think I would.

Q. Why?

A. I think it is very dangerous to carry knives around, especially five or six and in the second place it is very inconvenient.

Q. Can you keep a sharp edge on a knife you carry it back and forth?

A. Not if they bump against each other or any metal.

Q. And do you have the necessary equipment to carry knives home?

A. My pouch will only hold two knives.

Q. Have you ever been criticized for sharpening knives during shift time? [101]

A. I have heard others but I have not.

Q. I take it that you have never sharpened knives during the shift time.

Mr. Sullivan: That is objected to as being argumentative.

Mr. Scott: I will withdraw the question.

Q. You have never sharpened your knives except as you state?

A. I think I have a few times.

A. During the shift time? A. Yes.

Q. But so far you never was criticized for it?

A. No sir, I haven't.

(Testimony of Glenn Dennis.)

Q. During last March, April or May did you observe Mr. Brockes coming in and making a time study or a knife sharpening study?

A. I heard that he was doing it but I never saw him.

Q. Did you ever see him standing in the knife sharpening room making a time study?

A. He may have had a stop watch in his pocket but I would not know that.

Q. Is there any difference in the totals of the amount of time required to sharpen knives before a single header or a double header?

A. I don't think that there is.

Q. Can you explain why?

A. Well you actually use that knife the same length [102] of time if you use one knife on a single header or if you use four knives on a double header?

Q. If you use two knives on a single header shift would you have to sharpen them more than once?

A. I would have to touch them up.

Q. But the total amount of time spent would be the same?

A. Approximately, yes, I believe it would be approximately the same.

Q. Are there more of the boys in the knife sharpening room in the morning or during the noon hour? A. In the morning.

Q. How many employees are in the knife sharpening room in the morning at one time?

(Testimony of Glenn Dennis.)

A. Ten or twelve, some of them waiting to find room to use the table.

Q. Are conditions crowded there in the morning? A. I would say so, yes sir.

Q. During the morning when knives were sharpened, are the employees hitting each other with their elbows in the sharpening room during that operation, that is during the sharpening operations?

A. They are very careful of that, they have knives in their hands.

Q. Are they jostled around at all during this operation? A. Yes, I think they are.

Q. Is the knife sharpening operation done with dispatch [103] or are they lingering and waiting around there?

A. Outside of waiting for room at the table I would say that they are very prompt in sharpening their knives.

Q. Have you ever cut yourself in knife sharpening? A. Yes, I have.

Q. Do you recall any instance?

A. Yes, I have a scar on this finger (indicating) I was drawing my knife over the stone and I dropped my finger between the knife and the stone.

Q. Did that require any medical attention?

A. No sir, it didn't.

Q. You still have the scar from that cut?

A. Yes sir.

Q. And was this wound sufficient to cause bleeding to occur? A. Yes, it was.

(Testimony of Glenn Dennis.)

Q. Have you cut yourself at other times in the course of knife sharpening other than the time you mentioned?

A. Nothing worth mentioning.

Q. During the morning when you are sharpening your knives, are any instructions given by any foreman or any other official of the Company?

A. They may tell me what I am to do on that certain day; they have been changing off with the meat siders, training some men and they may tell me that [104] I am going to side beef on a certain day.

Q. Have you ever heard any foreman give instructions to the employés as to the work during the day, that is have they given instructions for the day's work during knife sharpening time?

A. Not that I recall, no sir.

Q. Does the knack of sharpening knives properly require skill that is obtained by experience?

A. To require a good edge on your knife, it is, yes.

Q. And how did you obtain that skill?

A. When I finish a knife up on a stone, let me put it this way, the lighter that you hit the stone the more even the edge will be, that is the way I finish up.

Q. Is that skill obtained by experience or does the Company give you a course?

A. No, that is obtained by experience.

Q. Have you ever heard of other employees be-

(Testimony of Glenn Dennis.)

ing injured during course of knife sharpening work?

A. Other than this broken leg, no, I have not.

Q. You are referring to the broken leg that was mentioned by Mr. Labusohr, in his testimony?

A. Yes sir.

Q. Apart from the use of a sharp knife in the performance of the work, would you have any other reason to sharpen your knife in the knife sharpening room before your shift started or during the [105] noon hour?

The Court: Now these questions and answers are so apparent and so perfectly obvious that I don't see any reason for taking up any time on this.

Mr. Scott: That is all.

Cross Examination

Q. (By Mr. Sullivan): Do you use five or six knives regardless of what you are doing

A. If we have a double header I use five or six knives; on a single header on hogs I use two knives and on beef possibly four knives.

Q. Regardless of how many knives you use, you have the same time and you do take about the same time that is 25 minutes to sharpen these knives, that is, outside of the time you take to keep them in good order?

A. Well, I work my knives in the morning like I said.

Q. This fifteen minutes is the way you determine that is the amount of time you use in sharp-

(Testimony of Glenn Dennis.)

ening your knives? A. Yes sir.

Q. Do you change clothes before you go on shift?

A. I change my clothes the first thing.

Q. Have you ever had to wait to sharpen your knives? A. Yes sir, I have.

Q. I believe that you stated that the sharpening room was crowded? [106] A. Yes sir.

Q. You also said that the table, you felt was not adequate? A. At times it is not.

Q. Is that very often? A. Quite often.

Q. Have you had to wait quite frequently?

A. I guess I have waited less than one half of the time.

Q. Maybe one half the time or almost half?

A. Well, it would be less than half.

Q. The time that you spent changing your clothes and waiting is included in the 15 minutes?

A. It would be, yes sir.

Q. Then you don't mean to say that the 15 minutes is all spent in sharpening knives?

A. I change my clothes.

Q. That is the length of time that you spend at the plant from the time you get there until you go to work? A. That is right.

Q. How long does it take to touch up a knife?

A. From three to five minutes.

Q. Longer than it does to sharpen a knife?

A. Almost as long.

Q. You sharpen five or six knives in 15 minutes

(Testimony of Glenn Dennis.)

not counting the clothes changing time, you change first? [107]

A. I still have 10 minutes at noon and I sharpen my knives at that time to I would say approximately 15 to 20 minutes.

Q. During the time you are in there at noon and in the morning sharpening knives, is there any discipline by the Company?

A. You see Mr. Brockes around there occasionally.

Q. And is it his purpose to discipline the men?

A. I suppose he is there to see what we are doing.

Q. Are you permitted to smoke there?

A. Yes sir.

Q. And to talk if you like? A. Yes sir.

Q. And you can do just as you please?

A. I have always done as I pleased.

Q. He is not in there to see that you do nothing but sharpen your knives?

A. No sir, I don't believe so.

Q. As a matter of fact you have no instructions as to when or in what manner you will sharpen your knives, isn't that correct?

A. I have no doubt that it is.

Q. And that is the general practice there?

A. I have heard him tell others that they should have their knives sharp before they go to work.

Q. But you haven't heard him tell them how that should [108] be done, how the knives should be sharpened or when?

(Testimony of Glenn Dennis.)

A. I have heard him tell them to have their knives sharp before it was time to go to work.

Q. If they sharpened them at night, that would be in plenty of time? A. Yes.

Q. And the Company does not designate the time in which the employees shall sharpen their knives?

A. It didn't make any difference just so it wasn't on Company time.

Q. And outside that they can do it at their own convenience?

A. Yes sir, I would say so.

Q. Do you own your own knives?

A. Yes sir.

Q. Where did your buy them?

A. At the plant, some of them, and some of them outside.

Q. You can buy them anywhere you want?

A. Yes sir.

Q. When you went to work as a knife man was it the understanding that you were to furnish your own knives? A. Yes sir, it was.

Q. How many knives did you buy last year?

A. Possibly 18 or 20.

Q. And in a year is that about the average? [109] A. Yes sir.

Q. Who sharpens your knives? A. I do.

Q. Do you always do that? A. Always.

Q. Do you have some of the other men sharpen them for you at times?

(Testimony of Glenn Dennis.)

A. I think that Mr. Brockes sharpened them once or twice.

Q. Do you sharpen knives, frequently, for other men? A. No.

Q. Isn't it true that you prefer to sharpen your own knives so that you can get them the way that you want them? A. Yes sir. [110]

* * * * *

Q. And your work is skinning cattle and shaving hogs? A. Yes sir.

Q. And those are your duties?

A. Yes sir.

Q. That is what you are employed by the Company to do? A. Yes, that is right.

Q. To skin cattle and shave hogs?

A. Yes, or anything else that might ask me to do.

Q. But those are the chief duties that you are employed to do? A. Yes sir.

Q. And to properly perform that employment, is it necessary that your tools be in proper condition and that your knives be sharp?

A. Yes sir.

Mr. Sullivan: That is all.

Redirect Examination

* * * * * [111]

Q. (By Mr. Scott): When you first went on the knife job, did the Company specify each individual task that you would perform in doing your work? A. No.

(Testimony of Glenn Dennis.)

Q. Were you employed to do every task necessary in your job? A. Yes sir.

Mr. Sullivan: We object to that as not proper redirect examination.

The Court: Possibly not, but I will overrule the objection.

Q. So far as you know, was it or was it not one of the tasks that you were to perform, I mean by that was sharpening knives one of the tasks that you were to perform?

The Court: Now that is a leading question.

Q. You say that you were employed to perform all of the tasks required on the job?

A. Will you please repeat that?

Q. Is knife sharpening one of the tasks required to be performed to do your job properly?

A. Yes sir.

Q. And did you consider that you were employed to perform every required task encompassed within your job? A. Yes sir. [113]

* * * * *

HAROLD SMITH

Called as a witness by the Plaintiff, after first being duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Scott): Are you employed as a butcher for the King Packing Company? A. Yes, sir.

Q. Are you a journeyman butcher?

A. No sir.

Q. Do you perform your work on the killing

(Testimony of Harold Smith.)

floor? A. Yes sir.

Q. What task do you perform? [114]

A. I drop hides, and he [illegible] beef and hogs.

Q. How long have you been engaged in this task? A. Four years.

Q. You say that you drop hides and what else was it?

A. I head beef and hogs and shave hogs.

Q. Do you sharpen your own tools, that is, your knives? A. Yes sir.

Q. How many knives do you sharpen a day?

A. Four or five.

Q. And what are the various kinds of knives that you sharpen?

A. Sheep and siding knives.

Q. Is that a sheep legging knife?

A. Yes sir.

Q. And what other kinds of knives?

A. Skinning knife and shaving knife.

Q. When do you do your knife sharpening work?

A. Morning, noon and night, I do most of mine in the morning and at night.

Q. Some days do you perform your knife sharpening at night and in the morning?

A. I do.

Q. Those times that you sharpen your knives at noon, have there been any employees sharpening knives at that time too? A. Yes sir.

Q. While you have been doing this sharpening at noon, [115] did any foreman or any official

(Testimony of Harold Smith.)

of the Company see you that you know of?

A. Some of them have been in there.

Q. Will you name the foremen or other officials who were there?

A. I think Mr. May.

Q. And who is he?

A. He was a superintendent there.

Q. You say he is a superintendent?

A. Yes sir, he was.

Q. Is he still employed? A. Yes sir.

Q. And do you know of any others?

A. Yes, Mr. Rich, he is a killing floor boss.

Q. How long a time or how much time do you spend in sharpening your knives, that is, per day?

A. I spend generally,—I punch in generally at 15 minutes after seven, I usually get there about 15 minutes early and I will go in at that time and if I aint got room then I wait and I will put in what time I can in the morning and that will average 10 or 12 minutes in the morning and then at night another 10 or 12 minutes.

Q. And that would be 20 or 24 minutes a day?

A. Yes sir.

Q. And what would be the opinion when you would spend time there at noon?

A. If I am heading hogs I sharpen at night or in the [116] morning, you see, if we work on them that same afternoon I sharpen them again.

Q. Does it take longer to sharpen knives for a single or a double header?

(Testimony of Wesley Anderson.)

Q. Now, referring to Plaintiff's Exhibits No. 18, 19, 20 and 21, how long would it take you to wear a knife down to the condition they are in?

A. Well, I don't know whether you noticed that but two are worn down farther than the other, when I am trimming hams and shoulders I wear them down the same as No. 18, the other knives, after I wear them down like that then I use them to bone in the afternoon; I have to keep a better knife to trim hams.

Q. How long does it take to wear a knife down so that you throw it away?

A. About three months.

Q. How long do you spend each day sharpening knives, or did I ask you that?

A. Yes sir, you did.

Q. And does that time include the time spent in bevelling? A. Yes sir.

Q. How often do you have to sharpen a knife?

A. Once a day. [127]

Q. Is it indispensible to the performance of your work properly to have sharp knives?

A. What does indispensible mean?

Q. Could you perform your work properly without a sharp knife?

The Court: I don't think that anybody disputes that.

Mr. Scott: Will the defendant stipulate that a sharp knife is indispensible.

Mr. Sullivan: We will stipulate that a sharp

(Testimony of Harold Smith.)

A. Well, in heading you are apt to hit a tooth pretty often. And it is not a set amount, you can't set how many you can do with one knife.

Q. In your task of heading, when you hit hogs, does a single header or when you get a double header on which do you have to sharpen the most knives? A. It is about the same.

Q. About the same? A. Yes.

Q. You do have two sets of knives for a double header?

A. Well, you can cut so much before the knife becomes dull and that is all, of course, a knife is sharper after you cut a 100 cuts than it would be after 200 or 300.

Q. This noon time knife sharpening was to resharpen the knives for a double header?

A. Yes sir.

Q. And does this time that you have mentioned include bevelling time?

A. Yes sir, it does.

Q. Do you have to sharpen your knives,—strike that please,—how often do you have to sharpen them? A. Every day or more. [117]

Q. Do you furnish all your knives or do you use some of the Company knives?

A. I furnish my own.

Q. Do you spend any time in touching them up, that is, your knives?

A. Will you repeat that?

Q. Do you spend any time touching your knives on a whetstone?

(Testimony of Harold Smith.)

A. Not very often but I have done it.

Q. Do you spend time toushing your knives up on a steel? A. Yes sir, I do.

Q. How often do you touch up your kn- s on a steel?

A. Well dropping heads two or three times.

Q. Is that during each head? A. Yes sir.

Q. You are constantly using the steel throughout the day?

A. Yes sir, pretty often, I do that every time my knife needs it.

Q. And how often does it need that on a daily basis?

A. Well, a cow, or beef comes through there about an average of one every five minutes and I would say three times every five minutes.

Q. Is that throughout the day?

A. Yes sir.

Q. Would you say that you use more time using the steel than you do using the whetstone in the morning? [118] A. I don't know.

Q. When you were hired to do this job of dropping hides and heading hogs and beef and shaving hogs, did the person who hired you specify every task that you were to perform on the job or were you just hired to perform on one task, I mean did they tell you everything in connection with the job?

A. I just hired out and I learned to do the job that he put me on.

Q. Did they hire you to do a job or did they

(Testimony of Harold Smith.)

tell you every movement that would be required on that job?

A. No, they didn't tell me.

Q. Did you consider,—strike that out please,—were you employed to perform all of the tasks required? A. Yes, I was.

Q. And is one of the tasks required on that job, sharpening knives?

The Court: Why don't you ask him to specify the tasks that he has?

Q. Do you have any thoughts whether a sharp knife is necessary for the proper performance of your work?

A. Yes, you have to have a sharp knife.

Q. Could you perform your work without a sharp knife?

A. You couldn't perform the work without a sharp knife, no sir.

Mr. Scott: That is all, you may cross examine.

Cross Examination

Q. (By Mr. Sullivan): Where were you employed before you went with the King Packing Company?

A. I was farming.

Q. Then you never worked in a butchering or slaughterhouse, in that business before you went with the King Packing Company?

A. I worked for the King Packing Company before.

Q. And did you start right in as a butcher?

A. As a butcher's helper.

Q. And what are those tasks?

(Testimony of Harold Smith.)

A. Well, that is boning heads or shackling hogs.

Q. You went to work as a knife man?

A. Yes sir.

Q. Had you had any previous experience as a knife man? A. No sir.

Q. You have been working four years on the killing floor? A. Yes, sir.

Q. Your duties for which you were employed were dropping hides and heading beef and hogs?

A. And shaving hogs for a couple of years, yes sir.

Q. Do you own all of the knives that you use?

A. Yes sir.

Q. Where did you acquire them?

A. I bought them through the King Packing Company and in town. [120]

Q. Could you purchase them anywhere you wished?

A. It would be hard to get some of them.

Q. Did the Company require that you buy the knives from them? A. No sir.

Q. You could buy them downtown or anywhere that you wanted? A. Yes sir.

Q. Were you told, or was it your understanding that you were to furnish your own knives?

A. Yes sir.

Q. You testified that sharp knives were necessary? A. Yes sir.

Q. The tools that your furnished must be kept in proper condition, the knives must be kept sharp in order to properly perform the duties for which you are employed, is that correct? A. That is right.

Mr. Sullivan: That is all.

Mr. Scott: I believe that is all.

WESLEY ANDERSON

Called as a witness by the Plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Scott): Are you employed as a butcher by the King Packing Company?

A. In the cutting room. [121]

Q. Are you employed in the trimming room or the cutting room of the King Packing Company?

A. Yes sir, I am, in the cutting room.

Q. For the information of the Court, the trimming and the cutting room are one and the same?

A. As far as I know, yes sir.

Q. And what do you call the room you are working in, the cutting or the trimming?

A. I usually call it the cutting room.

Q. The cutting room? A. Yes sir.

Mr. Sullivan: We will stipulate that the cutting room and the trimming room are the same room.

Mr. Scott: Very well.

Q. Do you have a name for the job that you are to perform?

A. Yes, I take out ribs or trim hams and shoulders in the morning and in the afternoon whatever there is to do.

Q. And the task that you do in the afternoon is what?

A. Sometimes I bone hams and shoulders or bone heads or grind bone meal.

(Testimony of Wesley Anderson.)

Q. How long have you been employed in the cutting room of the King Packing Plant?

A. It is just a little over three years,—I think it was September that I started.

Q. In the performance of your work do you cut meat from [122] the bone?

A. In the afternoon, sometimes I do, yes.

Q. Does that work,—your work in the afternoon require the cutting of standard cuts, hams and loins and so on, that is, besides cutting meat from the bone?

A. I just trim them after they are cut.

Q. What do you trim?

A. I take the ribs off the side and I take the sides of the hams and trim them and I trim the shoulders up too.

Q. Do you sharpen your own knives?

A. Yes sir.

Q. How many knives do you sharpen?

A. About three, usually.

Q. And what are those knives?

A. Ribbing knife, two boning knives and there for awhile I used a shaving knife that I would sharpen.

Q. Do you mean when you say a ribbing knife, do you mean the spararib knife?

A. I wouldn't sharpen the shaving knife on my own time.

Q. You have Exhibit No. 6 there, Mr. Anderson, is that your spararib knife?

(Testimony of Wesley Anderson.)

A. That is not mine but it is one just like mine, this is new.

Q. This is like yours? A. Yes.

Q. And that knife is furnished by the Company? [123] A. Yes sir.

Q. And these other two knives that you use are they furnished by the Company or by yourself?

A. Myself.

Mr. Scott: I would like to have these marked as Plaintiff's Exhibit No. 18, 19, 20 and 21.

Q. Would you identify what has been marked as Exhibit No. 18.

A. That is one of my boning knives.

Q. Will you identify Exhibit marked 19, 20 and 21.

A. That is also a boning knife.

Q. And what is the number of that, Mr. Anderson? A. 19.

Q. And what is this?

A. That is an old boning knife of mine.

Q. That is Plaintiff's Exhibit No. what?

A. No. 20.

Q. Will you identify No. 21?

A. That is one of my boning knives.

Mr. Scott: We will introduce in evidence at this time Exhibit No. 18, 19, 20 and 21.

Mr. Sullivan: We have no objections.

The Court: They may be admitted.

Q. Have these knives identified as Exhibits 18, 19, 20 and 21 been worn to the condition they are in while you were employed by the King Packing

(Testimony of Wesley Anderson.)

Company? A. Yes sir, [124]

Q. Handing you No. 18, will you describe the condition of that knife when it was new?

A. From right here (indicating) the blade comes up a little bit from the handle, it is a little narrower than the handle and I think that they are supposed to be six inch knives.

Q. And would the same description apply to Exhibit 19, 20 and 21 and to their original condition? A. Yes sir.

Q. When do you sharpen your knives?

A. Usually in the morning.

Q. And what other time, you say you usually do it in the morning?

A. Well, here awhile back I was coming early in the morning and then I sharpened them at night and now I sharpen them in the morning.

Q. How long does it take you to sharpen them in the morning?

A. About 20 minutes.

Q. Does that include sharpening the Company sparerib knives?

A. Yes sir,—I believe that I said shaving knives a few minutes ago when I said the knives belong to the Company I meant, of course, the sparerib knives.

Q. When did you usually sharpen the sparerib knives, was that on your own time or the Company time? A. On my own time. [125]

Q. Have you ever sharpened the sparerib knife on Company time? A. Yes sir, I have.

(Testimony of Wesley Anderson.)

Q. Has anything been said to you by any official or any foreman of the Company about sharpening the spareribb knife on Company time?

A. Yes sir.

Q. What was that?

A. I was told once,—I was sharpening the spareribb knife and I was told that I could sharpen them on Company time and it wasn't long after that when I was told to have them sharpened in time to go to work.

Q. Since you were told to have them ready to go to work have you sharpened the spareribb knives on your own time?

A. Yes, I have tried to, I don't think that I run over on the time.

Q. In the trim job which you hold, which is the first to work on the meat after it goes through the saw?

A. That is me, I work on it.

Q. How many people work behind you?

A. On the same side of the table?

Q. How many who handles the meat handle it after you? A. Three.

Q. And if you take time off during the shift to sharpen the Company spareribb knives on Company time, would [126] that hold up these three employees behind you? A. Yes sir.

Q. Did I ask you how long you have worked for the King Packing Company? A. Yes sir.

Q. How long did you say?

A. A little over three years.

(Testimony of Wesley Anderson.)

knife is necessary to the proper performance of his work.

Q. Do you recall whether you observed a time study being made last March or April as the knife sharpening in the knife sharpening room?

A. No, I didn't know they were checking.

Q. During the time that you were sharpening your knives, are you sharpening them diligently or are you wasting your time or how do you proceed?

A. Well, I don't think that I waste too much time, although I don't try to hurry too fast and cut my fingers, I just move right along.

Q. Do you sharpen knives as fast as possible without endangering your fingers or injuring yourself? A. Yes, I think that I do.

Q. Have you ever sharpened your own knives on Company time and been critigized for that?

A. Yes, sir. [128]

Q. Will you explain that criticism?

A. Well, I have been told that I should have them sharpened in time to go to work.

Q. Who told you that? A. Mr. Brockes.

Q. Did you ever take your knives home?

A. I took some home, some that are not worn out too bad so that we can use them.

Q. Other than because they are worn out, have you ever taken any home?

A. I have taken them home two or three times.

Q. And for what purpose?

A. Well, I cut up my father-in-law's pig and

(Testimony of Wesley Anderson.)

I cut up piece of meat that I took home or something like that, then I would take my knives home with me.

Q. Otherwise you leave your knives at the plant in the knife room? A. Yes sir.

Q. Could you take your knives home as a regular practice and sharpen them?

A. I guess that I could.

Q. Would there be any effect on their sharpness when you returned to the plant the next day, if you took them home?

A. I am afraid that there would be.

Q. What effect would that be?

A. Well they would be hitting something or other on the [129] way in and it would ruin the edge.

Mr. Scott: You may examine, that is all.

Cross Examination

Q. (By Mr. Sullivan): You testified that sharp knives were desirable in this business?

A. Yes sir.

Q. And you further said that if you took the knives home and then had to bring them back you might dull them up a little in transportation?

A. Yes sir, I don't think that they would get back without being nicked.

Q. A sharp knife is for your benefit?

A. For both of our benefits.

Q. As long as you have to sharpen your knives, the maintaining of a room by the Company is for your benefit because you don't have to take them

(Testimony of Wesley Anderson.)

home; if you had to take them home then they would not be as good and you would have more trouble? A. That is right, yes sir.

Q. You testified that you were told at one time that these ribbing knives,—that you should sharpen them or could sharpen them on Company time?

A. Yes sir.

Q. And were you ever told after that not to sharpen them on Company time? [130]

A. I was told that [illegible] work.

Q. That was in reference to your own?

A. No, not my own knives.

Q. That was not in reference to your own knives?

A. Well, they are mine if I use them.

Q. What are your duties in the afternoon, Mr. Anderson?

A. Whatever there is to do.

Q. Would there be any chance for you to sharpen the ribbing knives in the afternoon without holding up the entire production of the King Packing Plant? A. Yes sir, there would be.

Q. Those knives that you own yourself, you testified they were boning knives? A. Yes sir.

Q. Where do you buy them?

A. Mostly from the King Packing Company.

Q. You could buy them anywhere you wanted to? A. Yes sir.

Q. You were told that you were to furnish your own knives? A. Yes sir.

Q. And also to sharpen your own knives?

(Testimony of Wesley Anderson.)

A. I was.

Q. Do you sharpen knives for other men?

A. No, I don't think they like anyone to sharpen their knives. [131]

Q. Each man likes to sharpen his own?

A. Yes, I imagine so, I know that I do.

Q. It is an individual tool and you like to take care of it?

A. Yes sir, I think that is right, I know I do.

Mr. Sullivan: That is all.

Redirect Examination

Q. (By Mr. Scott): There was a time in the afternoon that you could sharpen the spareribs knives and would you still, if you did sharpen them, would you have to touch them up for the morning work?

A. Yes, I am afraid that I would.

Q. There is no time except prior to the shift for touching up the knives without holding up the whole cutting table? A. Yes, there isn't.

Mr. Scott: That is all. [132]

* * * * *

W. A. RANSOM

Called as a witness by the Plaintiff, after being [133] first duly sworn, testifies as follows:

Direct Examination

Q. (By Mr. Scott): Are you employed by the King Packing Company on its cutting and trimming floor? A. Yes sir.

(Testimony of W. A. Ransom.)

Q. In what capacity are you employed?

A. Trimming pork and boning beef.

Q. How long have you been employed to trim pork and beef?

A. I worked for them approximately 10 years.

Q. How many knives do you sharpen in a day?

A. Four.

Q. What are those knives?

A. At the present time they are boning knives.

Q. All boning knives at the present time?

A. Yes sir.

Q. You furnish all of those knives yourself?

A. Yes sir.

Q. Did you use to sharpen,—strike that please, was there a time when you sharpened some other kind of knives beside boning knives?

A. Up to the last two months I have been sharpening loin knives.

Q. Loin knives? A. Yes.

Q. You have in your hand Plaintiff's Exhibit No. 9, I will ask you if that is a type of loin knife that you [134] sharpened?

A. No, it is not the type, it is the opposite knife, it is used on the left or is a lefthand and I used the right hand.

Q. Otherwise it is the same?

A. Yes, but it is shaped differently.

Q. Did you furnish the loin knives or did the Company furnish the loin knives?

A. The Company did.

Q. When did you sharpen your knives?

(Testimony of W. A. Ransom.)

A. In the morning.

Q. How long does it take at the present time when you sharpen only the boning knives?

A. Well practically 20 minutes.

Q. Does that include the bevelling time?

A. Yes sir.

Q. When you were sharpening these loin knives what other knives did you sharpen at that time?

A. Two boning knives.

Q. When you were sharpening the two boning and the loin knives, how long did it take you to sharpen them?

A. Practically the same time.

Q. You sharpened knives in the morning?

A. Yes sir, I always did.

Q. And when you sharpened the loin knives of the Company did you sharpen them before or after shift? A. Before shift. [135]

Q. Were you told that you could sharpen them, —that is the loin knife or knives after shift?

A. No sir.

A. Do you know whether Mr. Brockes or any other official of the Company eye saw you sharpen that Company loin knife before shift?

A. Yes sir.

Q. What foreman or official saw you sharpen that before shift?

A. Mr. May and Mr. Brockes.

Q. And Mr. May is what?

A. Well, he used to be the foreman over the cutting crew or the trimming crew.

(Testimony of W. A. Ransom.)

Q. Is he still with the Company?

A. Yes sir.

Q. And what capacity is he in now?

A. He is a kind of foreman over some other part of the plant, I don't know.

Q. Referring to the loin knife by itself, how long would it take to sharpen that?

A. It depended on what kind of shape it is in, but I think approximately five minutes.

Q. About five minutes to sharpen the loin knife?

A. Yes sir.

Q. If the loin knife was nicked or otherwise dull it would take longer?

A. That is right. [136]

Q. Do you recall any instance when the loin knife was particularly dull and took considerable time?

A. It could be,—I dropped it once or twice and it would take longer, sometimes it gets a nick in, if it hits something when you would slip the handle on a wet place.

Q. How long would it take to sharpen it then?

A. It would depend on how dull it is, if you had to put a new edge on it of course, it would take five or ten minutes.

Q. Did you spend any time during the day touching up knives on the whetstone?

A. Once in awhile I would.

Q. Did the Company pay you for that time?

A. I did it on Company time once in awhile.

Q. Has the Company, or any official or foreman

(Testimony of W. A. Ransom.)

criticized you for touching up the knives during shift time? A. No sir.

Q. Do you use the steel throughout the day to touch up the knives? A. Yes sir.

Q. And the Company pays for that steeling time? A. Yes sir.

Q. How many employees follow after you on the cutting table?

A. Well sir, I am right down at the bottom but when I was pulling loins there was about four or five. [137]

Q. And if you took time off during the shift to sharpen the knives that would cause the whole cutting table to come to a halt until you return to your position? A. Yes sir.

Q. And that would include stopping to sharpen the loin knife? A. Yes sir.

Q. And it would also cause the cutting table to come to a halt if you sharpened your loin knife?

A. Yes, while you sharpen it.

Q. Did you observe in March or April any time study being made on the sharpening time?

A. I heard that Mr. Brockes kept a stop watch.

Q. Did you ever see him use it?

A. Not in the sharpening room but other places.

Q. Not in regard to the time spent in sharpening knives?

A. He might have had it but I never saw him take it out there.

Q. In the morning when the knives were being

(Testimony of W. A. Ransom.)

sharpened would you say that there was plenty of room for the employees?

A. I would say that it is a little crowded but I am generally there and I got my sharpening done.

Q. How many people are there in the sharpening room in the morning?

A. That is hard to answer.

Q. Are there enough to make it uncomfortable? [138]

A. Yes, I have seen it when they would have to wait their turn to get to the table and at other times they would not.

Q. During the time you are sharpening your knives before shift are there any instructions given by the foreman or any other officials of the Company?

A. Well, yes, he gives me instructions on how to work the men.

Q. What do you mean by that?

A. Well, I am the lead man at the cutting table and I am told how to work the men.

Q. Who would tell you how to work the men?

A. Up to about three years ago Mr. Mays and from that time on Mr. Brockes.

Q. What has been your observation whether or not the sharpening of the knives in the knife room is being conducted with dispatch and promptness or do the employees joke and waste their time?

A. I have had orders to have the knives sharp to go to work. When this new table went in a few

(Testimony of W. A. Ransom.)

months ago you have to be in there to do the work, to do your operation or you hold up the rest.

Q. Is the knife sharpening being done promptly?

A. I think it is because I know I haven't any time to waste, I do mine promptly.

Q. Do you ever take your knives home?

A. No sir. [139]

Q. It has been testified that the floor of the sharpening room is covered with oil and that the top of the table is covered with oil?

A. That could be helped by not using too much oil and by putting new shrouds on the table.

Q. Has the Company ever requested you not to put now shrouds or have they refused to put new shrouds on the table?

A. Yes, they requested us not to use new shrouds at one time.

Q. And as a result of this old shrouds on the top of the table it becomes dirty with oil and that oil falls off on to the floor? A. Yes sir.

Q. Is there a sufficient amount of oil on the floor to make it slippery? A. Sometimes.

Q. Have you ever injured yourself during the course of knife sharpening? A. No sir.

Mr. Scott: I think that is all, you may examine.

Cross Examination

Q. (By Mr. Sullivan): Who uses the oil?

A. The employees that sharpen their knives.

Q. And who spills the oil?

A. Well it is just poured on the stones when you sharpen [140] your knives and it works off.

(Testimony of W. A. Ransom.)

Q. And when it works off, where does it go?

A. On the table and from the table to the floor.

Q. And that is the natural result where a number of men are sharpening their knives?

A. That is right.

Q. Who furnishes the oil?

A. The Company does.

Q. How long does it take to bevel a blade?

A. That is included in the sharpening time, sometimes I bevel one knife one time and then another at another time.

Q. How long does it take to bevel one knife?

A. I would say three or four minutes.

Q. How often do you bevel knives?

A. About once a week.

Q. Did you ever sharpen the loin knife on Company time? A. Yes sir.

Q. Frequently?

A. Occasionally when it gets nicked up.

Q. You testified that you cannot sharpen a knife on Company time because it would hold up the Company operation?

A. Yes sir, it would.

Q. That is every day or afternoon?

A. I am working and if I am boning beef I don't have time to sharpen my knives until the next morning. [141]

Q. Have they ever told you to sharpen the Company knives on their time?

A. Sometimes they have told me when you are slacked up to sharpen my knives.

(Testimony of W. A. Ransom.)

Q. Have you not been told that you could sharpen the loin knives on Company time?

A. Yes sir, but he also told me to have them ready for work at 8:00.

Q. At the time you are supposed to start the shift you are supposed to start to work?

A. That is right.

Q. You never take your knives home?

A. Not that I use, only what I have worn out.

Q. Could you take them home if you wanted to?

A. Yes sir.

Q. Any time you wanted to?

A. Yes, they are your own knives.

Q. If you leave the Company would you take the knives with you?

A. Yes sir, unless I could sell them.

Mr. Sullivan: That is all. [142]

* * * * *

BRUCE MARCAS

Being called as a witness by the Plaintiff, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Scott): Mr. Marcas, are you employed by the King Packing Company on the trimming and cutting room floor? A. Yes, sir.

Q. How long was you employed there?

A. A little better than three years.

Q. What job do you perform?

A. At present I pull loins.

Q. How many knives do you sharpen a day?

(Testimony of Bruce Marcas.)

A. Two loin knives and two or three boning knives.

Q. You have been handed Plaintiff's Exhibit No. 9. I will ask you if that is the type of knife which you say you sharpen two of them a day?

A. This is the left and the right is similar to this but the curve is on the outside, on this side (indicating).

Q. Do you sharpen one right and one left?

A. Yes, sir. [143]

Q. What other knives do you sharpen?

A. Two or three boning knives.

Q. The two loin knives are furnished by the Company? A. Yes, sir.

Q. How long do you spend each day sharpening knives? A. Five minutes to a knife.

Q. The two boning knives are these (indicating)? A. Yes, sir.

Q. When do you sharpen the knives?

A. In the morning.

Q. Before the shift starts? A. Yes, sir.

Q. Have you been told that you could sharpen the loin knives on Company time?

A. Yes, sir.

Q. And why don't you sharpen them on the Company time rather than your own time?

A. For the reason that they told us to be on the job in time to start work.

Q. We have been talking here about sharp knives, how sharp does a knife have to be in order

(Testimony of Bruce Marcas.)

to be in proper shape for this butchering and trimming work?

A. I try to get mine sharp enough to shave with if necessary, you pretty near have to have them that sharp.

Q. Would you designate that as being razor sharp? A. Yes, sir.

Q. How much of a knock or jar would it take to dull a [144] knife that is that sharp?

A. Not very much, working on an older animal with hair, with bone and gristle, it would not take much to knock that edge off.

Q. Have you been criticized for not having a sharp enough knife? A. No, sir, I have not.

Mr. Scott: You may examine, that is all.

Cross Examination

Q. (By Mr. Sullivan): You sharpen the loin knives as a matter of your own preference?

A. Yes, sir.

Q. Five minutes per knife per day, is that based on the length of time that you are in the knife-sharpening room? A. Not all together.

Q. You are not sharpening knives all of the time that you are in there?

A. No, it is too crowded.

Q. Is that condition true as far as the rest of the men are concerned?

A. The biggest share of them, yes, sir.

Q. What time do you go on shift?

A. At 8:00.

(Testimony of Bruce Marcas.)

Q. What time do you go in the knife sharpening room?

A. Some time after 7:30, some time even before that. [145]

Q. Have you ever had to wait,—what happens if you don't get on the floor at that time?

A. Well, everybody just waits for me.

Q. Are you docked for that?

A. No, sir, not I.

Q. Isn't it true that you sharpen four boning knives and a loin knife in 14 minutes or less?

A. No, sir.

Q. It always takes 5 minutes?

A. Not always 5 minutes but that is the average.

Q. Have you kept track of your time lately in doing that? A. No, sir, I have not.

Q. But that is your idea of the time?

A. Well, you can tell by the way that I punch in.

Q. How do you punch in?

A. I come to work and I take my coat and cap off and punch the clock, sharpen my knives as soon as I can sharpen them.

Q. You are going by the time you punch in?

A. No, not altogether, sometimes I punch in about a half hour early and sometimes I don't get to sharpen my knives when I do get in.

Q. How do you determine how long it takes?

A. Well, I know, it is not the time that I am waiting standing there waiting.

Mr. Sullivan: That is all.

Mr. Scott: Nothing further. [146]

* * * * *

MARSHALL ANDERSON

Called as a witness by the Defendant, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Sullivan); Where do you reside, Mr. Anderson? Nampa, Idaho.

Q. Are you employed by the Defendant, King Packing Company? A. I am.

Q. In what capacity?

A. General Manager.

Q. How long have you been such general manager? A. For about five years.

Q. How long have you been employed by the King Packng Company?

A. For over 20 years.

Q. In what capacity?

A. All of the way from flunky to my present position, I was butcher's helper and butcher.

Q. Did you ever work on the killing floor?

A. Yes, sir. [147]

Q. As a knife man? A. Yes, sir.

Q. And also on the trimming floor?

A. Yes, sir.

Q. As a knife man there? A. Yes, sir.

Q. For how long did you work at that?

A. Three or four years.

Q. Do you have any interests in that corporation? A. Yes, sir.

Q. It is a corporation? A. Yes, it is.

Q. Who are the others, in the corporation?

(Testimony of Marshall Anderson.)

A. George King, Edith King and Mr. Charles Gossett.

Q. How long has it been a corporation?

A. Three years.

Q. It is an Idaho corporation?

A. Yes, sir.

Q. What was it before that, before it was incorporated? A. A partnership.

Q. Who were the partners?

A. George and Edith King and Mildred Dunn.

Q. That was before it was incorporated?

A. Yes, sir.

Q. Are the knife men required to furnish their knives in the killing room? A. Yes, sir.

Q. They purchase those knives themselves?

A. Yes, sir.

Q. From whom do they purchase the knives?

A. From the Company or from people who have knives for sale.

Q. Why do you sell knives to the men?

A. Well, the type used in butchering is a better steel, they are a better quality than ordinary and they are harder to obtain in the normal outlets. It is only for the employees to get those knives that we carry a stock of them.

Q. Is that true also of steels? A. Yes.

Q. You sell those to the men? A. Yes, sir.

Q. Do you sell them at cost? A. Yes, sir.

Q. And the Company makes no profit on the sales? A. That is right.

Q. There is no profit to the Company?

(Testimony of Marshall Anderson.)

A. No, sir.

Q. Certain exhibits are admitted in this case, certain knives that are furnished by the Company, you have seen those? A. Yes.

Q. What knives are those of the draw type,—are those owned by the Company? [149]

A. Yes.

Q. What knives are owned?

A. Well, the ribbing knives and several others, they have been testified to here.

Q. Those owned by the Company?

A. Yes, sir.

Q. And they are furnished to the employees?

A. Yes, sir.

Q. Why does the Company own these knives?

A. Well, the knives are very expensive, they are too expensive for the employees to buy. In this area we are the only ones that use this loin type of knife and a man would not have any use for that after he left our employ.

Q. Does more than one man use those knives?

A. Yes, sir, several use them during the week.

Q. With relation to the knives the men use and own, are they sharpened on their own time?

A. Yes.

Q. That is during the shift or before they go on shift?

A. It is before they go on shift or at noon.

Q. Are they compensated for that time?

A. No, sir.

Q. Have they ever been paid for sharpening

(Testimony of Marshall Anderson.)

knives since you have been there? A. No, sir.

Q. And that is the last 20 years? [150]

A. No, sir, they have not.

* * * * *

Q. Are you familiar with the packing industry in this area? A. Yes, sir.

Q. And with the various plants?

A. Yes, sir.

Q. Are you familiar with the customs as to knife sharpening time being compensated for?

A. Yes, sir, I am.

Q. Are you generally familiar with that?

A. Yes.

Q. I will ask you whether or not it is the custom and practice in the plants in this area to compensate the employees for sharpening their knives after they go on duty?

Mr. Scott: Now we object to that as no foundation is laid.

The Court: If the witness knows he may testify, and he has testified that he knows; the objection is overruled.

A. All of the packers follow the same practice that we do. [151]

Q. Such time is not compensated for?

A. That is correct.

Q. In relation to the men that use knives,—first, are you in charge of the personnel as General Manager? A. Yes, sir.

Q. Are you in charge of the employment of the employees of the King Packing Company?

(Testimony of Marshall Anderson.)

A. I don't hire all of the men, some of the designated foremen do, but I am in charge of all of it.

Q. It is under your supervision?

A. Yes, sir.

Q. In relation to the men on the killing floor who use knives, what duties are they called upon to perform?

Mr. Scott: That is objected to as it calls for a conclusion.

The Court: In a sense it does call for a conclusion but you may go ahead.

A. What was the question?

(Question read by the reporter.)

The Court: The objection was overruled.

A. The men are required to side cattle, to rump cattle, to viscerate cattle, to shave and viscerate hogs, drop heads and generally to do the butchering of all livestock.

Q. In relation to the men in the trimming and cutting room who use knives, what duties are they employed to perform? [152]

A. We call it cutting the carcass, dis-assembling the carcass, trimming loins, bellies, trimming hams, legs and picnics.

Q. At the time a man employed as a knife man, so called, on the killing floor or in the trimming room, does he understand or is he informed that he is to furnish his own knives?

A. He understands or he is informed of that.

(Testimony of Marshall Anderson.)

Q. He understands that?

A. Yes, sir, generally he brings his knives.

Q. The testimony is that the knives are sharpened in the tool or the knife room?

A. That is right.

Q. And what discipline is exercised over the men in this room? A. None.

Q. Are they permitted to smoke and visit if they care to? A. Yes, sir.

Q. And do they do that? A. Yes, sir.

Q. If the employees are required to be compensated for the time they are in the sharpening room, sharpening their knives, would it be necessary to exert some discipline over them?

A. Yes, sir, I think so, you must do that.

Q. If such was the case, would it be necessary to employ a man to sharpen the knives? [153]

A. It would be to their convenience to hire a man to sharpen all of the knives rather than let each man individually sharpen his own.

Q. Are any instructions given to the men by the Company as to the manner in which they shall sharpen their knives? A. No, sir.

Q. Is there any inspection of the knives by the Company? A. No, sir.

Q. Is there any standard enforced by the Company as to the sharpness of the knife?

A. No, sir.

Q. During the time the men are on shift after they start to work on the killing floor or in the cutting room, are they permitted to leave their work

(Testimony of Marshall Anderson.)

temporarily to go to the bathroom for instance or to answer the telephone or to make calls and so on?

A. Yes, sir.

Q. And if at that time slaughtering is in process does it stop production? A. No, sir.

Q. How is it handled?

A. The foremen, generally a journeyman butcher, doesn't have any specific duties and he works here and there to catch up or he designates another man to take the place temporarily.

Q. And production carries on? [154]

A. That is right.

Q. If a man should dull his knife in an emergency could he drop out from his work and sharpen the knife? A. Yes, sir, that is right.

Q. And would that be on Company time?

A. That is correct.

Q. Now, then, steeling the knives, is that done constantly throughout the day?

A. Yes, they have to do that.

Q. That is to keep an edge on the knife?

A. Yes, sir.

Q. That is done on Company time?

A. That is right.

Q. Is there any requirement that the men sharpen knives in this tool room or knife room?

A. No, sir.

Q. They could do it at home or any place they desire? A. Yes, sir.

Q. Are you in the process, or rather is the Company in the process of insfalling a new system in

(Testimony of Marshall Anderson.)

the plant? A. Yes, sir.

Q. Will you tell the Court what that is briefly?

A. It is a moving chain system to convey the product to the employee rather than having them push it along, it is an endless chain, that is what we call it in the industry, and a moving table where the hog is brought to the men to do a specific duty.

Q. When do you expect that to be installed?

A. Within two weeks.

Q. And then will the Company run single headers? A. Yes, sir.

Q. What is a single header?

A. Killing one specie each day, either cattle or hogs.

Q. When the Company is slaughtering hogs and the hogs goes to the first man who works with a knife, what is the condition of the body or carcass?

A. He has been de-haired and he is practically a clean hog.

Q. Would there be any dirt or other foreign objects on the body at that time?

A. Very little if any.

Q. So the knife would not be dull by such a contact as he would make? A. No, sir.

Q. How many days a week will the Company, under the new system, slaughter hogs and slaughter beef?

A. Cattle two days a week and hogs three days a week, about as we do now.

Mr. Sullivan: I think you may examine.

(Testimony of Marshall Anderson.)

Cross Examination

Q. (By Mr. Scott): What are the scheduled shift hours in the cutting or the trimming room?

A. That varies according to how we need them.

Q. Is it a scheduled 8-hour day?

A. No, they never cut over four hours, mostly three hours in the actual cutting room.

Q. What is the normal daily or weekly shift there?

A. They come at 8:00,—they come at 7:30 now.

Q. And when do they leave? A. At 4:30.

Q. And there is a lunch period in there?

A. One hour, from 12 until 1.

Q. And that is five days a week.

A. Yes, barring any layoff.

Q. You don't have a staggered starting time in the trim room as you do on the killing floor?

A. That is correct.

Q. Is that because there is not as much lag in the trimming room as on the killing floor?

A. That is correct.

Q. We have introduced into evidence three types of knives furnished by the Company to the employees and we have had witnesses testify to the use of knives furnished by the Company,—at least one knife each day by some employees in the trimming room?

A. No, that would not follow necessarily, some men don't like the ribbing knife.

Q. I am talking about the loin knives, the skin-

(Testimony of Marshall Anderson.)

ning and the ribbing knives, each one of those is used by someone on the trim floor every day?

A. That is right. [157]

Q. And every day those are used they have to be sharpened for that day's use?

A. That is correct.

Q. When a person is employed to work in the trimming room or on the killing floor it is understood by the Company and the employees that he is to use a knife if he is a knife man?

A. He would have to use a knife.

Q. He is employed and it is understood that he is to use a knife?

A. His duties are to use a knife.

Q. It is understood and recognized by the Company at the time of hiring that he will have to use a knife to perform the work that he is employed to perform? A. Yes, sir.

Q. It is also recognized at the time that he is employed that a knife he uses is to be sharp?

A. I think that is necessary of course. I may add that if it is not sharp when he starts when he first learned to be a butcher, that is one thing he learns.

Q. I realize that, but it is recognized that he has to have a sharp knife to perform his work properly? A. Yes, sir, that is right.

Q. It is recognized at the time a person is employed that someone has to sharpen that knife?

A. That would be true, yes, sir.

Q. And it is recognized that an employee will

(Testimony of Marshall Anderson.)

have to [158] sharpen a knife or the Company will have to sharpen the knife for him?

A. I would presume that someone would have to sharpen it.

Q. Who else would sharpen it besides the employee or the Company?

A. I don't know who else might sharpen it.

Q. It is necessary that either the Company or the employee would, it is recognized that he has to have the knife sharpened when the employee is employed? A. That is right.

Q. And it is the practice for the Company not to sharpen knives? A. That is correct.

Q. That is true in the King Packing Company plant? A. Yes, sir.

Q. So it is impliedly understood at the time that any employee is employed that he is employed to sharpen his knives?

A. No, we don't employ men for that duty. If I employed a man to sharpen knives I think that he would do that for three or four hours. I employ men to hang meat and other duties and maybe he will use a knife for three hours. I never have employed a man specifically to sharpen knives.

Q. You have never expressly employed a man to sharpen knives? [159] A. That is correct.

Q. But it is understood by the Company at the time that a knife man is employed, that under the Company practice he will have to sharpen knives?

A. I think that is correct.

(Testimony of Marshall Anderson.)

Q. Mr. Anderson, the Defendant furnishes an emery wheel and a grindstone?

A. That is correct.

Q. And those are located in the knife sharpening room for the use of the men in that knife sharpening room? A. Yes, sir.

Q. Do you have knowledge of that equipment and if so would you tell us of the value?

A. I think the old grindstone cost 12 or 14 dollars, it is old; I think the new emery wheel 75 dollars.

Q. Do you have to replace the emery stone on the wheel frequently? A. Twice a year.

Q. How much do they cost on the wheel?

A. Three or four dollars.

Q. If you saw an employee using the emery wheel in a manner you thought improper would you speak to him about it?

A. Yes, if I saw him use anything improperly I would do that.

Q. You would tell him the proper method or what you considered the proper method of sharpening knives? [160]

A. Not hardly; I think would be rebuked for doing that.

Q. If he proceeded in using improperly would you tell him the proper method?

A. I think one of the men working, yes.

Q. Besides these four knives that have been discussed,—in the cutting room, what other equipment is furnished by the Company in the trimming room for cutting meats?

(Testimony of Marshall Anderson.)

A. You mean like the table?

Q. No, like a saws and such?

A. We provide a beef splitting and scribe saw, the splitting saw is used to split beef and operated electrically, the scribe saw is an electrically operated saw to be used for hog splitting, to split the hog through the back, it is electrically operated, on the cutting floor we have a small "Jim Baught" band type of saw that is used there.

Q. Are there hand saws furnished by the Company? A. Not in that department.

Q. Is there other equipment furnished by the Company for the employees in the trimming or on the killing floor such as cleavers?

A. We use no cleavers unless the saws break.

Q. Who mends this equipment that you have testified to? A. What was that?

Q. Who mends or keeps in repair the equipment that you have testified to? A. We do.

Q. Such as keeping it sharp?

A. You mean the saw blades.

Q. Yes.

A. They are sent out to a saw sharpening company.

Q. But your company sends the blades out and pays the cost of sharpening them?

A. That is correct.

Q. Now, I think that you testified that the employees sharpen their own knives on their own time, however, if an employee should dull his knife

(Testimony of Marshall Anderson.)

during the shift would he be permitted to sharpen his knife during the shift? A. Yes, sir.

Q. If during the day the company switches from pork to beef or vice-versa, the employees have to obtain a new set of knives to take care of the switch, are they permitted to sharpen that new set of knives on company time?

A. I would be of the opinion that the knives were sharpened; if they were not, of course, they would be permitted to sharpen them on company time.

Q. They would be permitted to do that on company time? A. Yes, sir.

Q. I think you have stated that the employees have been told that they could sharpen the company knives on company time? A. That is correct.

Q. It has been testified that the employees throughout the day spend some considerable time in steeling the knives on the steel that they carry?

A. That is correct.

Q. Do you know or do have any opinion as to the comparison of time that the employees spend steeling knives during the day as to the time they spend in the morning using the whetstones?

A. Do you mean how does the time compare?

Q. Yes, the time steeling the knives and using the whetstones. A. I have no offhand opinion.

Q. Would you say that the time steeling knives is greater or less than the time used sharpening knives in the morning?

A. I would say that the time spent steeling

(Testimony of Marshall Anderson.)

throughout the day is considerably greater.

Q. If an employee did not have a properly sharpened knife to perform his work and you noticed such fact, would you speak to him about that matter? A. Yes, I think that I would.

Q. We discussed a moment ago in regards to this production line, if a man pulls out that the foreman is called to take his place?

A. Either the foreman or one of the other men laps over.

Q. So there is a gap that occurs that has to be filled in one way or another?

A. Yes sir, that is true, if a man steps out. [163]

Q. What was the statement regarding the custom and usage as to sharpening knives in the packing house industry?

A. In this area with which I am very familiar we all use the same methods.

Q. And what is this adjacent area?

A. I would specifically say beginning with Walla Walla on the west to Reno on the south, Lewiston on the north, and Ogden on the East is the area in which we encounter our competition.

Q. And what is the custom as to Ogden, does that include Ogden, your statement concerning the custom, does that include Ogden?

A. No, to Ogden.

Q. Were you familiar with the custom throughout the United States generally, that is, as to paying or not paying for knife sharpening in the packing house industry?

(Testimony of Marshall Anderson.)

A. Only through reading about it.

Q. Referring to what is known as the big four, that is, Armour Company, Cudahy Packing Company, Wilson Company and Swift and Company, do you know what the practice is in operation of the big four as to knife sharpening, whether it is paid for by the company?

A. In some places it bargained for; it varies depending on the custom, that is, where it is, they have different customs and contracts and the big four have too. It is a matter of bargaining with the big four. [164]

Q. Are you familiar with the Armour Company contract with the meat cutters of the AF of L covering their plants in San Francisco, California; Spokane, Washington; Greenbay, Wisconsin; Huron, South Dakota; Grand Forks, North Dakota; Peoria, Illinois; Columbus, Ohio; Pittsburgh, Pennsylvania; Baltimore, Maryland; Reading, Pennsylvania; Memphis, Tennessee; Lexington, Kentucky; and Portland, Oregon?

A. I would not be familiar with the contract, I think I have read it.

Q. Would it surprise you to know that under that contract, which covers 6,000 employees, that the company furnishes knives sharpened or pays the employees for sharpening knives?

A. No, I think they bargained it but that is a very small part of the Armour Company employees, I think that there are some 143,000 Armour employees and these 6,000 are AF of L and the rest

(Testimony of Marshall Anderson.)

probably are CIO that is the organization they bargain with.

The Court: What union do you bargain with?

A. AF of L.

Q. Are you familiar with the Cudahy Packing Company contract with the United Packing House workers of the CIO covering their plants in Kansas City, Kansas; Newport, Minnesota; Omaha, Nebraska; Sioux City, Iowa; Denver, Colorado; Wichita, Kansas; Los Angeles, California; North Salt Lake, Utah; East Chicago, [165] Indiana; and Albany, Georgia.

Mr. Sullivan: We object to this as being entirely immaterial to what contract other Packing Companies have.

The Court: I think if it has any materiality at all it is very slight but I will allow you to go ahead.

A. No, I am not familiar with the Cudahy Company contract.

The Court: Of course it appears to me that if this Company had a contract it would be bound by that contract.

A. We do have a contract.

Q. You are not familiar with the fact that under that contract the Cudahy Company furnishes knives sharpened or pays the employees for sharpening knives?

A. No, I am not familiar with that.

The Court: Are you endeavoring to develop the custom or collective bargaining?

(Testimony of Marshall Anderson.)

Mr. Scott: I think that collective bargaining would establish custom.

The Court: Would establish a custom or other operators that do not have a contract.

Mr. Scott: We are establishing the practice in the industry.

Q. Are you familiar with the agreement between Wilson Company and United Packing House workers covering approximately 10,000 workers in Cedar Rapids, Iowa; Albertlea, Minnesota; Kansas City, Kansas; Chicago, Illinois; Fairbault, Minnesota; Omaha, Nebraska; [166] and Los Angeles, California? A. No sir.

Q. Would it surprise you to know that under this contract the company furnishes knives already sharpened and pays the employees for sharpening knives?

A. No sir, that would not; I think they furnish the knives also, they buy those knives do they not?

Q. It is my understanding that the Company furnishes knives to the employees.

A. Yes, I think that is correct.

Q. Are you familiar with the Swift and Company contract with the Amalgamated Meat Cutters and Butcher Workmen of America, of the AF of L covering twelve plants in National City, Illinois; Watertown, South Dakota; Montgomery, Alabama; Nashville, Tennessee; Baltimore, Maryland; North Portland, Oregon; South San Francisco, California; Columbus, Ohio; Lake Charles, Louisiana; Ocala,

(Testimony of Marshall Anderson.)

Florida; Scotts Bluff, Nebraska; and Ogden, Utah?

A. No sir, I am not.

Q. Would it surprise you to know that under that contract the company pays the employees for sharpening knives?

A. They could as a matter of bargainning.

Mr. Scott: That is all.

Redirect Examination

Q. (By Mr. Sullivan): Does the companys set any quotas as to the number of [167] animals that are to be killed in any one day?

A. No sir.

Q. How are your men paid?

A. On an hourly basis.

Q. Is there any piece work?

A. No sir.

Q. Is there any incentive of any kind, like that?

A. No sir.

Q. You testified on cross examination that the Company or the employee would have to sharpen their knives; could the employee have any one else sharpen the knives if so desired?

A. Yes, sir.

Q. He could have his wife, his children, a neighbor or anyone he wants to, he is not required to do it himself?

A. That is correct.

Q. Then it is not the employee or the Company that must do the sharpening?

A. No sir, you are correct on that.

(Testimony of Marshall Anderson.)

Q. Anyone could? A. That is right.

Mr. Sullivan: That is all.

Mr. Scott: I would like these marked as Exhibits No. 22 and 23.

The Court: I presume those are collective bargaining contracts, is that right? [168]

Mr. Scott: Yes, sir. Your Honor, these are collective bargaining contracts, and Exhibit No. 22 is a Master agreement between the Amalgamated Meat Cutters and Butcher Workmen of North America and Swift and Company. Plaintiff's Exhibit No. 23 is a Master agreement between the Amalgamated Meat Cutters and Butcher Workmen of North America and Armour and Company. These are the only two I have at the present time and they are introduced for the purpose of showing the practice under these two agreements, which, in the Armour Company agreement is contained in paragraph 49 and in the Swift and Company agreement in sections 3 and 4. I offer these in evidence as Plaintiff's Exhibits No. 22 and 23.

Mr. Sullivan: We object to the admission of these Exhibits first, that they have not been properly identified and we object to them as being wholly incompetent, irrelevant to any issues in this case.

The Court: As to the identification they look like what they are purported to be.

(Remarks of counsel and court reported but not transcribed).

The Court: I think that they may go in for what they are worth.

PLAINTIFF'S EXHIBIT No. 22

SWIFT & COMPANY MASTER AGREEMENT

with Amalgamated Meat Cutters and Butcher Workman of North America (A. F. L.)
Covering Period August 11, 1948 to August 11, 1949

This agreement is made between Swift & Company (hereinafter called the Company) on behalf of its meat packing plants hereinafter in this preamble set forth, and Amalgamated Meat Cutters & Butcher Workmen of North America, A.F.L. (hereinafter called the Union) on behalf of the local unions hereinafter in this preamble set forth.

* * * * *

It is recognized by both parties that they have a mutual interest and obligation in maintaining friendly cooperation between the Company and the Union, which will permit safe, economical and efficient operation of the plants.

* * * * *

Section 3. It is agreed that knives, steels, whetstones, meat trimmers' hooks, and overhauling hooks will be furnished to those employees using them. These tools are to be furnished in addition to all heavy tools and safety devices now being furnished by the Company.

Section 4. It is agreed that those employes using tools and equipment furnished by the Company will be paid for the time spent preparing and repairing those tools and equipment as regular work time

which will be scheduled or handled by the foreman, the same as any other assignment of work for which he is reponsible.

* * * * *

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA (A. F. of L.)
By EARL W. JIMERSON
President
By PATRICK E. GORMAN
Secretary-Treasurer
By ROY SCHEURICH
By RUSSELL E. DRESSER
By JOHN I. POWDERLY
By GLEN A. SNYDER

SWIFT & COMPANY
By J. E. WILSON
General Superintendent

Chicago, Illinois, July 2, 1948.

* * * * *

PLAINTIFF'S EXHIBIT No. 23

MASTER AGREEMENT

By and between The Amalgamated Meat Cutters and Butcher Workmen of North America (Union) and Armour & Company (Employer)

1. This is an Agreement made December 23, 1946, between Armour and Company (hereinafter called the Company) and the Amalgamated Meat Cutters

and Butcher Workmen of North America (hereinafter called the Union) on behalf of the local Unions under its jurisdiction, for the bargaining units hereinafter described, in the slaughtering and meat packing plants of the Company hereinafter named.

* * * * *

6. It is the intent and purpose of the parties hereto that this agreement shall promote and improve the industrial and economic relationship between the Company and the Union, and to set forth herein rates of pay, hours of work and working conditions of employment to be observed between the parties hereto.

7. It is recognized by both parties that they have a mutual interest and obligation in maintaining friendly cooperation between the Company and the Union, which will permit safe, economical, and efficient operation of the plants.

* * * * *

49. The Company shall either supply knives, steels, whetstones and meat hooks prepared for use at its expense, or permit employees using same to prepare them on Company time (as a work assignment determined upon and directed by management) as the Company may elect. When piecework employees prepare said items at management's direction, they will be compensated for time so spent at the job rate; and their assignment to such work shall be scheduled and handled by the foreman in

a manner similar to other assignments of work for which he is responsible. Employees shall prepare knives, steels, meat hooks and whetstones at such time as they are directed to do so by management.

* * * * *

ARMOUR AND COMPANY
F. D. GREEN
B. E. HOOVER
BERT HOLLAND

AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA (AFL)

EARL W. JIMERSON, President
PATRICK E. GORMAN, Sec.-Treas.
ROY SCHEURICH
GLEN A. SNYDER
JOHN J. POWDERLY

* * * * *

Mr. Sullivan: The defense rests.
Mr. Scott: The plaintiff rests.

* * * * *

[Endorsed]: Filed Mar. 27, 1952.

[Endorsed]: No. 13540. United States Court of Appeals for the Ninth Circuit. Maurice J. Tobin, Secretary of Labor, United States Department of Labor, Appellant, vs. King Packing Company, a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Idaho, Northern Division.

Filed: September 13, 1952.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13540

MAURICE J. TOBIN, Secretary of Labor, United States Department of Labor,

Appellant,

vs.

KING PACKING COMPANY, a corporation,

Appellee.

APPELLANT'S STATEMENT OF POINTS

Pursuant to Rule 19(6) of the Rules of this Court, appellant makes the following statement of the points on which he intends to rely:

1. The lower court erred in making Findings of Fact Nos. 7, 9, 12, 14 and 15, and in making Con-

clusions of Law Nos. 3, 4, 6, 7, 8, 9, 10, 12 and 13.

2. The lower court erred in concluding that the knife sharpening activities, performed by appellee's killing floor and cutting room employees, are preliminary and postliminary rather than principal activities, within the meaning of Section 4(a)(2) of the Portal-to-Portal Act of 1947.

3. The lower court erred in dismissing the complaint and in failing to grant the injunction prayed for in the complaint.

/s/ WILLIAM S. TYSON,
Solicitor
/s/ BESSIE MARGOLIN,
Assistant Solicitor
/s/ KENNETH C. ROBERTSON,
Regional Attorney
/s/ JAMES F. SCOTT,
Attorney
United States Department of Labor, Attorneys for Appellant.

Affidavit of Service attached.

[Endorsed]: Filed Sept. 29, 1952. Paul P. O'Brien, Clerk.

177 *Minute entry of argument and submission*

[Omitted in printing.]

October 6, 1954

178 In United States Court of Appeals for the Ninth Circuit

Order Directing Filing of Opinion and Filing and Recording of Judgment

October 21, 1954

Ordered that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

179 In United States Court of Appeals for the Ninth Circuit

No. 13,540, Oct. 21, 1954

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLANT

v.

KING PACKING COMPANY, A CORPORATION, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO, NORTHERN DIVISION

Opinion

(Filed October 21, 1954)

Before: ORR and POPE, Circuit Judges, and YANKWICH, District Judge

ORR, Circuit Judge.

King Packing Company, a corporation, hereafter King Packing, operates a meat packing plant near Nampa, Idaho. It employs twelve or fourteen knifemen on its killing floor and nine or ten in the cutting room. These employees are employed on a regular eight-hour shift, five days a week, with an hour off at noon and a five minute rest period both morning and afternoon. The men are compensated at hourly rates. Certain of the knives used by the men are furnished by King Packing. All other knives used by each employee are owned and furnished by him. This is a re-

quirement incident to employment: It is a rule at the plant and a custom and usage in force there that the men sharpen their own knives outside the scheduled shift of eight hours and for this activity the men are not compensated. While King Packing has a rule permitting the knives it furnishes to be sharpened during regular shift hours, employees ordinarily sharpen them on their own time, because the exigencies of the production line make it impracticable to do so during shift hours. A room for
180 sharpening, in which there is an emery wheel and grindstone, is furnished by King Packing. In order to keep the edge on the blade throughout the shift the men frequently steel their knives. This operation, which is a distinct process from sharpening with whetstone, emery wheel and grindstone, is performed on company time and compensated for.

The Secretary of Labor brought an action in the District Court seeking to enjoin King Packing from alleged violations of the Fair Labor Standards Act. His complaint is bottomed on the failure to compensate for knife sharpening. King Packing contends that this time is not required to be recorded or paid for because of the provisions of Section 4 of the Portal-to-Portal Act of 1947 regarding "preliminary" or "postliminary" activities. A solution of the question posed requires a determination of whether the knife sharpening operations performed by the employees before starting or after concluding the regular eight-hour shift were "preliminary" or "postliminary" to the principal activity or activities performed by the men. The relevant portions of the controlling statutory provision, § 4 of the Portal-to-Portal Act, are set forth in note 1.[1]

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[1] Section 4 of the Portal-to-Portal Act of 1947, 29 U. S. C. A. § 251, et seq. so far as here relevant, provides as follows:

"Sec. 4.

"(a) Except as provided in subsection (b), no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healy Act, or the Bacon-Davis Act, on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after the date of the enactment of this Act——

"(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

"(2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

"(b) Notwithstanding the provisions of subsection (a) which relieve an employer from liability and punishment with respect to an activity, the em-

181 The Supreme Court of the United States, in the case of Anderson v. Mt. Clemens Pottery Co., 328 U. S. 680, 692-93, gave examples of various activities which it termed "preliminary". One of these examples was "assembling and sharpening tools", the identical activity with which we are concerned in the instant case. The Portal-to-Portal Act was passed by Congress subsequent to the decision in the Mt. Clemens case with the purpose in mind, among other things, of making non-compensable certain preliminary activities, which the Mt. Clemens case had held to be compensable. See Part I of the Portal-to-Portal Act of 1947, Findings and Policy; H. R. Rep. No. 71, 80th Congress, 1st Session (1947). Sections 2 and 3 of the Act deal with then existing claims which particularly prompted its enactment, while section 4 deals with future claims such as those involved in the instant case. If our conclusion that Congress enacted the Portal-to-Portal Act for the purpose of making non-compensable certain activities held to be compensable in the Mt. Clemens case, and in so doing used the term "preliminary" in the same sense that the Supreme Court of the United States used it, is valid, then "assembling and sharpening tools" is a "preliminary" activity. Knives used in the King packing plant are tools; and knives were what the employees were sharpening.

The Secretary argues that the sharpening of knives is not "preliminary" or "postliminary" but rather "an integral part of a principal activity", since it is indispensable to the proper performance of the employees' work. He relies on a statement by Senator Cooper, one of the sponsors of the Portal-to-Portal Act, made during Senate debate on the bill that the term "prin-
182 cipal activities" is "sufficiently broad to embrace within its terms such activities as are indispensable to the performance of productive work." The case of Steiner et al., v. Mitchell, 6 Cir., No. 14,934, decided August 10, 1954, supports this contention. In our view the terms "preliminary" or "postliminary" cannot be interpreted so as to exclude all activity "indispensable to the performance of productive work." To do so would deny effect to the intended meaning of the Portal-to-Portal Act. All of the activities designated as "preliminary" by the Supreme Court in the Mt.

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ployer shall not be so relieved if such activity is compensable by either——

"(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

"(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective bargaining representative and his employer."

Clemens case can be considered indispensable. See McComb v. C. A. Swanson & Sons, D. Nebr., 1948, 77 F. Supp. 716, 733.

While, as we have said, section 4 of the Act is the controlling provision in this case, we have found it helpful in our construction of the meaning and intent of section 4 to consider cases which deal with section 2, although section 2, unlike section 4, does not explicitly refer to preliminary activities. Section 2 has been construed as referring to the activities involved in the Mt. Clemens case. In deciding cases under section 2 the courts have had occasion to describe various activities as principal or as preliminary. In support of his contention that the knife sharpening involved in the instant case is a principal activity the Secretary relies on several of these cases.[2] These cases are distinguishable. The activities treated as principal in these cases were the same or very similar to activities which the employees performed throughout their working day.

Other cases arising under section 2 describe as preliminary the activities involved in the instant case, namely, the sharpening of knives used in a meat packing plant. Market v. Swift & Co., 2 Cir. 1949, 173 F. 2d 517, 520; Smith v. Cudahy Packing Co., D. Minn., 1947, 76 F. Supp. 575. The activities described as preliminary in still other cases are analogous to those here involved.[3]

The Secretary argues that there is in effect in the instant case an express provision of a written contract which prevents the employer from being relieved of liability under section 4. He relies upon the following provision in the collective-bargaining agreement in effect between King Packing and the Union. "All time worked over and above [eight hours a day and forty hours a week] shall be time and one-half." Section 2 as well as section 4 provides that an employer shall not be relieved of liability for activities made compensable by an express provision of a written contract. In so doing section 2 employs language identical to that used in section 4. In support of his contention that an express provision prevents the employer from being relieved of liability in the instant case, the Secretary relies on two cases arising under section 2: Joshua Hendy Corp. v. Mills, 9 Cir. 1948,

[2] Biggs v. Joshua Hendy Corp., 9 Cir. 1950, 183 F. 2d 515; United States Steel Co. v. Burkett, 4 Cir. 1951, 192 F. 2d 489, 491; F. W. Stock & Sons v. Thompson, 6 Cir. 1952, 194 F. 2d 393; Central Missouri Tel. Co. v. Conwell, 8 Cir. 1948, 170 F. 2d 641; Glenn L. Martin Nebraska Co. v. Culkin, 8 Cir. 1952, 197 F. 2d 981.

[3] Bauler v. Pressed Steel Car Co., 7 Cir. 1950, 182 F. 2d 357 (cleaning of firearms by guards); Plummer v. Minneapolis-Moline Power Implement Co., D. Minn. 1948, 76 F. Supp. 745 (same); Rote v. J. Niels Lumber Co., D. Montana, 1947, 74 F. Supp. 812 (caring for tools used in logging operations).

169 F. 2d 898; Frank v. Wilson & Co., 7 Cir. 1949, 172 F. 2d 712, cert. denied 337 U. S. 918. Each of these cases is distinguishable. In the first an employee who was required to attend to his regular duties during his so-called lunch period. In the second the contract provided for time and one-half compensation for "employees who are required to work over eight hours in any one day," and certain employees were required to be "punched in" five minutes before the regular shift time for which they were compensated.

At the time the contract providing compensation for "all time worked" was entered into by King Packing and the Union it was the custom and practice at the plant that time spent in sharpening knives was not compensated. This existing custom should be considered in interpreting the intent of the parties in employing general language as to "time worked". The custom in effect at
the plant that time spent in knife-sharpening was non-com-
184 pensable was continued after the execution of the contract without complaint on the part of the Union. In construing an agreement it is useful to consider the interpretation placed upon it by the parties. The continuation of the existing custom without complaint is most conclusive that the parties in the use of general language as to payment for overtime were referring to work performed outside the eight-hour shift but of the same character as the work usually performed within the regular shift.

Judgment affirmed.

[File endorsement omitted.]

185 In United States Court of Appeals for the Ninth Circuit

No. 13540

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLANT

v.

KING PACKING COMPANY, A CORPORATION, APPELLEE

Judgment

Filed and entered October 21, 1954

Appeal from the United States District Court for District of Idaho, Northern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Idaho, Northern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is, affirmed.

[File endorsement omitted.]

186 In United States Court of Appeals for the Ninth Circuit

Order Denying Petition for Rehearing

December 10, 1954

On consideration thereof, and by direction of the Court, It is ordered that the petition of appellant, filed November 29, 1954, and within time allowed therefor by rule of Court, for a rehearing of the above cause be, and hereby is, denied.

187 [Clerk's certificate to foregoing transcript omitted in printing.]

189 Supreme Court of the United States

No. 647, October Term, 1954

[Title omitted.]

Order allowing certiorari

Filed April 25, 1955

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted, and the case is transferred to the summary calendar and assigned for argument immediately following No. 465.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1955

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No. — 37

In the Supreme Court of the United States

OCTOBER TERM, 1954

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

KING PACKING COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SIMON E. SOBELOFF,
Solicitor General,
Department of Justice,
Washington 25, D. C.

STUART ROTHMAN,
Solicitor, Department of Labor,
Washington 25, D. C.

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Steiner v. *Mitchell*, 215 F. 2d 171, pending on petition for a writ of certiorari, No. 465, this Term — 5, 6, 13, 14

Statutes:

Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended by the Fair Labor Standards Act of 1949, c. 736, 63 Stat. 910 (29 U. S. C. 201 *et seq.*):

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. ——

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

KING PACKING COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The opinion of the district court (R. 11–14) is reported at 107 F. Supp. 369. The opinion of the court of appeals (App. 1a–7a) appears at 216 F. 2d 618.

JURISDICTION

The judgment of the court of appeals was entered on October 21, 1954. A timely petition for rehearing was denied on December 10, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

STATUTES INVOLVED

Pertinent provisions of the Fair Labor Standards Act of 1938, as amended, c. 676, 52 Stat.

1060; c. 736, 63 Stat. 910 (29 U. S. C. 201, *et seq.*), and the Portal-to-Portal Act of 1947, c. 52, 61 Stat. 84 (29 U. S. C. 251 *et seq.*), are set forth in the Appendix, *infra*, 11a–16a.

QUESTION PRESENTED

Knifemen employed in respondent's meat packing plant spend time, each workday, in sharpening the knives which they use in their jobs. This activity, which is indispensable to the performance of their duties (butchering and trimming meat), is required by the employer to be done outside the scheduled eight-hour shift. Respondent provides a room and equipment for its accomplishment.

The question presented is whether this activity is a "principal" activity compensable under the Fair Labor Standards Act, rather than a "preliminary" or "postliminary" activity within the meaning of the Portal-to-Portal Act.

STATEMENT

The Secretary of Labor brought this action to enjoin respondent from violating the overtime and record-keeping requirements of Sections 15 (a) (2) and 15 (a) (5) of the Fair Labor Standards Act of 1938, as amended, in the employment of production workers, and from violating Section 15 (a) (1) of the Act by making interstate shipments of the goods produced by such workers.

The alleged violations of the Act (R. 3–8) arise from respondent's admitted failure (R. 8–11) to pay for or record the time spent by so-called knifemen, employed on its killing floor and in its cutting or trimming room, in sharpening the knives which they use in the performance of their work.

Respondent is an interstate meat packer (complaint, para. IV, R. 4; answer, para. IV, R. 9) engaged in slaughtering, butchering, dressing, and distributing meat and meat products. At its packing plant, it employs 70 to 80 persons, including 21 to 24 knifemen whose compensation rights are involved in this litigation. The knifemen perform various butchering operations, 12 or 14 of them working in the killing room and the remainder in the cutting room. Fdg. IV, R. 16. Under the terms of their employment, the knifemen supply certain types of knives which they use in their work, while other types are furnished by King Packing Company (App. 1a). The men are required to "sharpen their own knives outside the scheduled shift of eight hours and for this activity [they] are not compensated" (App. 2a; also, Fdg. VII, R. 17). "While King Packing has a rule permitting the knives it furnishes to be sharpened during regular shift hours, employees ordinarily sharpen them on their own time, because the exigencies of the production line make

it impracticable to do so during shift hours" (App. 2a).[1]

Respondent provides a room, outfitted with an emery wheel and grindstone, where the knife-sharpening is performed (App. 2a). This work is ordinarily done in the morning, before the scheduled shift, but it is sometimes done during the noon hour or after quitting time (R. 77, 87, 109).[2]

Knifemen are paid by the hour and, excluding the knife-sharpening time in controversy, they work eight hours a day, five days a week.[3]

The district court concluded that the principal activity which knifemen are employed to perform is "the killing, cleaning and cutting of carcasses"; that knife-sharpening is not a part of such principal activity but is merely "preliminary" or

[1] Respondent's production manager testified that company-owned knives are sharpened "some during working hours and some on their own [the knifemen's] time" (R. 74; see, also, R. 51). Keeping all knives sharp, as he pointed out, is essential to efficient production, which is conducted on an assembly-line basis. R. 45–46, 51–53, 55–56, 79.

[2] An employee is free to take his own knives home at the end of the workday and, assuming that he has the necessary equipment, to sharpen them before returning to work the following day. This is rarely done in practice, one reason being that the knife might have its edge dulled in the process of being carried back and forth. See R. 137, 80.

[3] In addition to knife-sharpening, knifemen must repeatedly steel their tools throughout the workday. This activity is done on company time and is compensated for. App. 2a.

"postliminary"; and that it is accordingly excluded from coverage under the Fair Labor Standards Act by Section 4 (a) (2) of the Portal-to-Portal Act (R. 19). It therefore ordered the action dismissed (R. 22).

The court of appeals affirmed, holding that even if knife-sharpening were "indispensable to" or an integral part of the butchering work, it was nonetheless "preliminary" and beyond coverage (App. 4a–5a). In reaching this conclusion, it recognized that *Steiner* v. *Mitchell*, 215 F. 2d 171 (C. A. 6), pending on petition for a writ of certiorari (No. 465, this Term), supports the opposite view.

REASONS FOR GRANTING THE WRIT

Section 4 of the Portal-to-Portal Act makes "preliminary" and "postliminary" activities noncompensable under the Fair Labor Standards Act. It also expressly preserves the compensability of "principal activities." These critical statutory terms are undefined.

The court below applied a test based solely on the time factor. It concluded that the work involved was "preliminary" or "postliminary" because it was performed before or after the performance of work on the production line. The effect of this approach, as the court recognized, is to hold that an activity which has a direct and necessary functional relationship to work on the production line is noncompensable if performed off-shift.

While "preliminary" and "postliminary" are words which imply a time relationship, the term "principal" is one which focuses upon the nature and importance of the activity concerned. The latter term suggests, and legislative history and related statutory provisions confirm, that it was the purpose of Congress to exclude off-shift activities which are only incidentally related to the job but to preserve coverage of activities which, though they are performed outside the employee's hours on the production line, are indispensably and functionally related to the productive work for which the employee is hired. For these reasons, the Court of Appeals for the Sixth Circuit concluded, in *Steiner* v. *Mitchell,* 215 F. 2d 171, now pending on petition for a writ of certiorari (No. 465), that men working with toxic materials in a battery plant were entitled to compensation for time spent in clothes-changing and showering.* That court held that a "principal activity" includes activities which are "an integral and indispensable part of a principal activity," even though performed before or after engagement in work on the production line. See 215 F. 2d at 175. The court below considered the *Steiner* decision and expressly rejected the Sixth Circuit's interpretation of the statute. In this, we believe it erred. The conflict, moreover, is one which should be resolved by this Court.

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*For a full statement of the facts of that case, we respectfully refer the Court to the memorandum filed by the Government in No. 465.

1. The accompanying Senate Report stated that it is the purpose of Section 4 of the Portal-to-Portal Act (App. 13a–15a) to preserve the compensability of "all activities which are an integral part" of a "principal activity" (S. Rept. No. 48, 80th Cong., 1st Sess., p. 48). As Senator Cooper, one of the sponsors of the legislation,[5] explained on the floor (93 Cong. Rec. 2297):

> We believe that in the use of the words "principal activity" we have preserved to the employee the rights and the benefits and the privileges which have been given to him under the Fair Labor Standards Act, because it is our opinion that those activities which are so closely related and are an integral part of the principal activity, indispensable to its performance, must be included in the concept of principal activity.

After giving the above explanation of the term, Senator Cooper was asked the following question by Senator McGrath (*ibid.*):

> Mr. McGrath. I think that at this point we might very definitely make contribution to the legislative history of what we are doing here. Am I correct in understanding

[5] Though the Portal Act had its origin in a bill introduced by Congressman Gwynne (H. R. 2157), Section 4, the provision here involved, was added by the Senate. The original Gwynne bill contained no comparable section (H. Rept. 326, 80th Cong., 1st Sess., p. 12). Senator Cooper was a member of a three-man subcommittee of the Committee on the Judiciary which conducted hearings on the measure (93 Cong. Rec. 2124) and formulated the Senate version (93 Cong. Rec. 2131; 93 Cong. Rec. 2293).

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> the Senator to say that what the majority of the committee proposes is that any activity of a worker shall be considered a part of his principal activity if the doing of that act is indispensable to the performance of the rest of his day's work?

Senator Cooper answered by giving two examples of what he meant by an integral part of a principal activity. Thereupon, Senator McGrath posed the case of a worker in a chemical factory whose duties require him to put on special clothing at the beginning of the workday and to shower at its conclusion—a type of activity which is indispensable and which must necessarily be performed while the employee is off the production line. The colloquy is as follows (*id.*, p. 2298):

> Mr. McGRATH. There are innumerable instances of operations which have to be performed that are not covered in these two particular examples. I think of one at the moment. In certain of our chemical plants workers are required to put on special clothing and to take off their clothing at the end of the workday, and in some of the plants they are required to take shower baths before they leave. Does the Senator regard such activity as that as coming within the compensable workday?
>
> Mr. COOPER. I am very happy that the Senator has asked the question, because I believe it gives the opportunity of drawing a fine distinction between the type of ac-

> tivity which we consider compensable and the type which should not be compensable. *In accordance with our intention as to the definition of "principal activity," if the employee could not perform his activity without putting on certain clothes, then the time used in changing into those clothes would be compensable as part of his principal activity.* On the other hand, if changing clothes were merely a convenience to the employee and not directly related to the specific work, it would not be considered a part of his principal activity, and it follows that such time would not be compensable. [Emphasis added.]

The history of the Portal-to-Portal Act shows further that a careful and purposeful distinction was drawn between Section 2 (which provided, *retrospectively,* that an employer would not be liable for back pay unless the compensability of the activity concerned had been fixed by contract or established custom; see App. 15a) and Section 4 (which relates to *future* rights of compensation). The aim of Section 2 was to wipe out the large number of "existing portal-to-portal cases" which had been filed following this Court's decision in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680. See 93 Cong. Rec. 2125, 2126, 2293, 2295. As Senator Donnell explained (*id.*, pp. 2125–2126):

> But the real purpose of this proposed legislation [Section 2] is to dispose of the

> existing portal-to-portal cases, and *we do not see any way to do except to take the entire activities of the entire 24-hour day, and provide by law that none of them shall be compensable unless by contract or custom.*
>
> * * * * *
>
> I should say that recognizing the grave economic problem, what we do is to undertake to wipe out all pending portal-to-portal cases, so far as it is humanly possible to do so. *In order to do that, we find it necessary to provide that any activity which is not compensable, either by contract, or by custom or practice not inconsistent with the contract, shall not be compensable.* [Emphasis added.]

On the other hand, as stated above, Section 4 preserves the compensability of the "principal activity or activities" an employee is engaged to perform, and makes noncompensable only those activities which are "preliminary" and "postliminary." The "key words" in Section 4, as pointed out by Congressman Walter (one of the House managers when the bill went to conference), are "principal activity or activities" (93 Cong. Rec. 4389). By omitting these words from Section 2 and including them in Section 4, Congress provided a strict rule for past claims and a different and more liberal rule for the future. This is emphasized by the following colloquy be-

tween Senator Pepper and Senator Cooper (93 Cong. Rec. 2299):

> Mr. PEPPER. The Senator has referred in his discussion with the Senator from Rhode Island to page 48 of the report of the committee, where there are set forth two instances of activities which are so interrelated to principal activities that they could be construed as principal activities and therefore compensable.
>
> * * * * *
>
> If I correctly understand the Senator, those incidental activities are to be construed under [the] part * * * of the bill dealing with *future claims as compensable work,* as principal activities.. Is that correct?
>
> Mr. COOPER. Excluding the use of the word "incidental." I do not think those activities are incidental. I think they are an integral part of the employment.
>
> Mr. PEPPER. I should like to ask the able Senator from Kentucky: Would workers who *have been* engaged in such activities as we have just been discussing be precluded under [the] part * * * of the committee bill, dealing with *existing* claims, from recovery for such work?
>
> Mr. COOPER. Exactly. [Emphasis added.][6]

---

[6] Senator Donnell's explanation of the bill likewise draws a careful distinction between past claims (Section 2) and future rights (Section 4):

"Mr. President, we were discussing part II of the bill. I may say, as previously indicated, that part II relates to

2. The Fair Labor Standards Amendments of 1949 confirm the view that the Portal-to-Portal Act does not automatically exclude from coverage all activities performed outside the hours spent on the production line. Thus, new section 3 (o) (App. 16a) provided that in computing hours of employment "there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the

---

existing claims. The purpose of part II is to deal solely with claims which exist at the time of the enactment of the pending measure.

"The Senate will observe in due time that *the approach which we make in the bill is quite different in the case of existing claims as contradistinguished from claims arising in the future.*" (93 Cong. Rec. 2179.)

* * * * *

"Mr. President, I have analyzed part II of the act, which relates, as I have indicated, to existing claims. *I now come to part III, which relates to future claims. Here, as I have indicated, we have approached the subject matter from quite a different angle.* We have taken the position under part II that in the first place we should extinguish, cancel, annul, and make unenforcible the collection of moneys in portal-to-portal suits. * * *" (93 Cong. Rec. 2181.)

* * * * *

"I was about to proceed to part III, which relates to future claims, that is to say, which governs employees in their relations with the employers after the enactment of this legislation. It determines what activities are compensable and what are not.

"Mr. President, here we have come to the conclusion that we do not legislate as to the entire 24-hour period, for if we do it may well be, and in fact will be, that we shall have legislated out of existence some claims which may bring about an injustice to the plaintiffs therein." (93 Cong. Rec. 2181). (Emphasis added.)

week involved by the express terms of or custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee." The exclusion, in certain defined circumstances, of clothes-changing and showering activities demonstrates that, in other circumstances, these activities may meet the test of compensability. See *Steiner* v. *Mitchell, supra,* 215 F. 2d at 173.

Moreover, Section 16 (c) of the 1949 Amendments (App. 16a) declares that existing administrative interpretations, not inconsistent with the Amendments, "shall remain in effect." Outstanding at the time was the Administrator's interpretation that certain "preparatory activities [those which are "closely related" to a principal activity and "indispensable to its performance"] which the Administrator has always regarded as work and as compensable under the Fair Labor Standards Act, remain so under the Portal Act * * *." See *General Statement as to the effect of the Portal-to-Portal Act of 1947 on the Fair Labor Standards Act of 1938,* p. 13 (12 Fed. Reg. 7655).[7]

3. The court below gave weight to the fact that this Court, in the *Mt. Clemens* case, used the descriptive term "preliminary" in referring to

[7] Compare *Alstate Construction Co.* v. *Durkin,* 345 U. S. 13, 16–17, in which the Court placed reliance upon Section 16 (c) and a prior administrative interpretation holding that a particular activity constituted the production of goods "for commerce."

a variety of activities, including the assembling and sharpening of tools (328 U. S. at 692–693). But this Court was not using the word as a term of art or construing it as a statutory term. And the meaning which Congress subsequently ascribed to the words "preliminary" and "principal" is to be derived from the legislative history which we have discussed above. Moreover, to assume, as did the court of appeals (App. 9a), that Congress broadly proposed to make *permanently* noncompensable all of the activities which this Court passingly described as "preliminary" in the *Mt. Clemens* case is to overlook the basic distinction, fully recognized by the Sixth Circuit in *Steiner,* 215 F. 2d at 173, between Sections 2 and 4: That a broad, exclusionary standard was adopted in relation to suits for back pay pending in 1947 (Section 2) and a discrete, more liberal, set of criteria for future rights of compensation (Section 4).

4. The issue of statutory interpretation on which the Sixth and Ninth Circuits have expressly differed is one of importance to the administration and enforcement of the Fair Labor Standards Act.[8] If, as held by the court below,

[8] Cases involving the interpretation of "principal" activities under the Portal Act are now pending before two other courts of appeals. *Ciemnoczolowski* v. *Q. O. Ordnance Corp.*, 119 F. Supp. 793 (D. Nebr.), on appeal to the Eighth Circuit, and *Mitchell* v. *Southeastern Carbon Paper Co.*, 124 F. Supp. 525 (N. D. Ga.), on appeal to the Fifth Circuit.

the words "preliminary" and "postliminary" exclude an activity performed off-shift, no matter what its importance and its functional relationship to the employee's performance of his job, a wide variety of significant employee activities in numerous industries fall outside the Act. If, on the other hand, as held by the Sixth Circuit, the term "principal" encompasses an off-shift activity which is integrally and indispensably related to the performance of the job, these same activities come within the law's protection. This difference in the interpretation of the governing criteria is one which should be resolved by this Court for the guidance of employer and employee alike.

CONCLUSION

It is respectfuly submitted that the petition for a writ of certiorari should be granted.

SIMON E. SOBELOFF,
Solicitor General.

STUART ROTHMAN,
Solicitor, Department of Labor,
Washington 25, D. C.

MARCH 1955.

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APPENDICES

APPENDIX A

United States Court of Appeals for the Ninth Circuit

No. 13540

Oct. 21, 1954

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLANT

v.

KING PACKING COMPANY, A CORPORATION, APPELLEE

Appeal from the United States District Court for the District of Idaho, Northern Division

Before: ORR and POPE, Circuit Judges, and YANKWICH, District Judge.

ORR, Circuit Judge:

King Packing Company, a corporation, hereafter King Packing, operates a meat packing plant near Nampa, Idaho. It employs twelve or fourteen knifemen on its killing floor and nine or ten in the cutting room. These employees are employed on a regular eight-hour shift, five days a week, with an hour off at noon and a five minute rest period both morning and afternoon. The men are compensated at hourly rates. Certain of the knives used by the men are furnished by King Packing. All other knives used by each employee are owned and furnished by him. This is a requirement incident to employment. It is a rule at the plant and a custom and usage in force

there that the men sharpen their own knives outside the scheduled shift of eight hours and for this activity the men are not compensated. While King Packing has a rule permitting the knives it furnishes to be sharpened during regular shift hours, employees ordinarily sharpen them on their own time, because the exigencies of the production line make it impracticable to do so during shift hours. A room for sharpening, in which there is an emery wheel and grindstone, is furnished by King Packing. In order to keep the edge on the blade throughout the shift the men frequently steel their knives. This operation, which is a distinct process from sharpening with whetstone, emery wheel and grindstone, is performed on company time and compensated for.

The Secretary of Labor brought an action in the District Court seeking to enjoin King Packing from alleged violations of the Fair Labor Standards Act. His complaint is bottomed on the failure to compensate for knife sharpening. King Packing contends that this time is not required to be recorded or paid for because of the provisions of Section 4 of the Portal-to-Portal Act of 1947 regarding "preliminary" or "postliminary" activities. A solution of the question posed requires a determination of whether the knife sharpening operations performed by the employees before starting or after concluding the regular eight-hour shift were "preliminary" or "postliminary" to the principal activity or activities performed by the men. The relevant portions of the controlling statutory provision, § 4

of the Portal-to-Portal Act, are set forth in note 1.[1]

The Supreme Court of the United States, in the case of *Anderson* v. *Mt. Clemens Pottery Co.*,

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[1] Section 4 of the Portal-to-Portal Act of 1947, 29 U. S. C. A. § 251, et seq., so far as here relevant, provides as follows:

"Sec. 4.

"(a) Except as provided in subsection (b), no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after the date of the enactment of this Act—

"(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

"(2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

"(b) Notwithstanding the provisions of subsection (a) which relieve an employer from liability and punishment with respect to an activity, the employer shall not be so relieved if such activity is compensable by either—

"(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

"(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer."

328 U. S. 680, 692–93, gave examples of various activities which it termed "preliminary." One of these examples was "assembling and sharpening tools," the identical activity with which we are concerned in the instant case. The Portal-to-Portal Act was passed by Congress subsequent to the decision in the *Mt. Clemens* case with the purpose in mind, among other things, of making non-compensable certain preliminary activities, which the *Mt. Clemens* case had held to be compensable. See Part I of the Portal-to-Portal Act of 1947, Findings and Policy; H. R. Rep. No. 71, 80th Congress, 1st Session (1947). Sections 2 and 3 of the Act deal with then existing claims which particularly prompted its enactment, while section 4 deals with future claims such as those involved in the instant case. If our conclusion that Congress enacted the Portal-to-Portal Act for the purpose of making non-compensable certain activities held to be compensable in the *Mt. Clemens* case, and in so doing used the term "preliminary" in the same sense that the Supreme Court of the United States used it, is valid, then "assembling and sharpening tools" is a "preliminary" activity. Knives used in the King packing plant are tools and knives were what the employees were sharpening.

The Secretary argues that the sharpening of knives is not "preliminary" or "postliminary" but rather "an integral part of a principal activity," since it is indispensable to the proper performance of the employees' work. He relies on a statement by Senator Cooper, one of the sponsors of the Portal-to-Portal Act, made during Senate debate on the bill that the term "principal

activities" is "sufficiently broad to embrace within its terms such activities as are indispensable to the performance of productive work." The case of *Steiner, et al.* v. *Mitchell,* 6 Cir., No. 11934, decided August 10, 1954, supports this contention. In our view the terms "preliminary" or "postliminary" cannot be interpreted so as to exclude all activity "indispensable to the performance of productive work." To do so would deny effect to the intended meaning of the Portal-to-Portal Act. All of the activities designated as "preliminary" by the Supreme Court in the *Mt. Clemens* case can be considered indispensable. See *McComb* v. *C. A. Swanson & Sons,* D. Nebr., 1948, 77 F. Supp. 716, 733.

While, as we have said, section 4 of the Act is the controlling provision in this case, we have found it helpful in our construction of the meaning and intent of section 4 to consider cases which deal with section 2, although section 2, unlike section 4, does not explicitly refer to preliminary activities. Section 2 has been construed as referring to the activities involved in the *Mt. Clemens* case. In deciding cases under section 2 the courts have had occasion to describe various activities as principal or as preliminary. In suport of his contention that the knife sharpening involved in the instant case is a principal activity the Secretary relies on several of these cases.[2] These cases

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[2] *Biggs* v. *Joshua Hendy Corp,* 9 Cir. 1950, 183 F. 2d 515; *United States Steel Co.* v. *Burkett,* 4 Cir. 1951, 192 F. 2d 489, 491; *F. W. Stock & Sons* v. *Thompson,* 6 Cir. 1952, 194 F. 2d 493; *Central Missouri Tel. Co.* v. *Conwell,* 8 Cir. 1948, 170 F. 2d 641; *Glenn L. Martin Nebraska Co.* v. *Culkin,* 8 Cir. 1952, 197 F. 2d 981.

are distinguishable. The activities treated as principal in these cases were the same or very similar to activities which the employees performed throughout their working day.

Other cases arising under section 2 describe as preliminary the activities involved in the instant case, namely, the sharpening of knives used in a meat packing plant. *Market* v. *Swift & Co.*, 2 Cir. 1949, 173 F. 2d 517, 520; *Smith* v. *Cudahy Packing Co.*, D. Minn., 1947, 76 F. Supp. 575. The activities described as preliminary in still other cases are analogous to those here involved.[3]

The Secretary argues that there is in effect in the instant case an express provision of a written contract which prevents the employer from being relieved of liability under section 4. He relies upon the following provision in the collective-bargaining agreement in effect between King Packing and the Union. "All time worked over and above [eight hours a day and forty hours a week] shall be time and one-half." Section 2 as well as section 4 provides that an employer shall not be relieved of liability for activities made compensable by an express provision of a written contract. In so doing section 2 employs language identical to that used in section 4. In support of his contention that an express provision prevents the employer from being relieved of liability in the instant case, the Secretary relies on two cases arising under section 2: *Joshua Hendy Corp.* v.

[3] *Bayler* v. *Pressed Steel Car Co.*, 7 Cir. 1950, 182 F. 2d 357 (cleaning of firearms by guards); *Plummer* v. *Minneapolis-Moline Power Implement Co.*, D. Minn. 1948, 76 F. Supp. 745 (same); *Role* v. *J. Niels Lumber Co.*, D. Montana, 1947, 74 F. Supp. 812 (caring for tools used in logging operations).

Mills, 9 Cir. 1948, 169 F. 2d 898; *Frank* v. *Wilson & Co.*, 7 Cir. 1949, 172 F. 2d 712, cert. denied, 337 U. S. 918. Each of these cases is distinguishable. In the first an employee was required to attend to his regular duties during his so-called lunch period. In the second the contract provided for time and one-half compensation for "employees who are required to work over eight hours in any one day," and certain employees were required to be "punched in" five minutes before the regular shift time for which they were compensated.

At the time the contract providing compensation for "all time worked" was entered into by King Packing and the Union it was the custom and practice at the plant that time spent in sharpening knives was not compensated. This existing custom should be considered in interpreting the intent of the parties in employing general language as to "time worked." The custom in effect at the plant that time spent in knife-sharpening was non-compensable was continued after the execution of the contract without complaint on the part of the Union. In construing an agreement it is useful to consider the interpretation placed upon it by the parties. The continuation of the existing custom without complaint is most conclusive that the parties in the use of general language as to payment for overtime were referring to work performed outside the eight-hour shift but of the same character as the work usually performed within the regular shift.

Judgment affirmed.

(Endorsed:) Opinion. Filed Oct. 21, 1954.

PAUL P. O'BRIEN, *Clerk.*

United States Court of Appeals for the Ninth Circuit

No. 13540

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLANT

v.

KING PACKING COMPANY, A CORPORATION, APPELLEE

Judgment

Appeal from the United States District Court for District of Idaho, Northern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Idaho, Northern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is, affirmed.

(Endorsed:) Judgment filed and entered October 21, 1954.

PAUL P. O'BRIEN, *Clerk.*

United States Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of Friday, December 10, 1954.

Before: ORR and POPE, Circuit Judges, and YANKWICH, District Judge.

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, it is ordered that the petition of appellant, filed November 20, 1954, and within time allowed therefor by rule of Court, for a rehearing of above cause be, and hereby is denied.

APPENDIX B

STATUTORY PROVISIONS INVOLVED

Fair Labor Standards Act of 1938, as amended, c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910 (29 U. S. C. 201 *et seq.*):

DEFINITIONS

SEC. 7. (a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

SEC. 11. * * *

(c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

SEC. 15. (a) After the expiration of one hundred and twenty days from the date

of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation; and except that any such transportation, offer, shipment, delivery, or sale of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer that the goods were produced in compliance with the requirements of the Act, and who acquired such goods for value without notice of any such violation, shall not be deemed unlawful;

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14;

* * * * *

(5) to violate any of the provisions of section 11 (c) or any regulation or order made or continued in effect under the provisions of section 11 (d), or to make any statement, report, or record filed or kept pursuant to the provisions of such section

or of any regulation or order thereunder, knowing such statement, report, or record to ~~be false in a~~ material respect.

SEC. 17. The district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands shall have jurisdiction, for cause shown, to restrain violations of section 15: *Provided*, That no court shall have jurisdiction, in any action brought by the Administrator to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action.

Portal-to-Portal Act of 1947, 61 Stat. 84, 29 U. S. C. 251 *et seq.*:

SEC. 4.

(a) Except as provided in subsection (b), no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after the date of the enactment of this Act—

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the

time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

(b) Notwithstanding the provisions of subsection (a) which relieve an employer from liability and punishment with respect to an activity, the employer shall not be so relieved if such activity is compensable by either—

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargainjng representative and his employer.

(c) For the purposes of subsection (b), an activity shall be considered as compensable under such contract provision or such custom or practice only when it is engaged in during the portion of the day with respect to which it is so made compensable.

(d) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an employer employs an employee with respect to walking, riding, traveling, or other preliminary or

postliminary activities described in subsection (a) of this section, there shall be counted all that time, but only that time, during which the employee engages in any such activity which is compensable within the meaning of subsections (b) and (c) of this section.

Compare:

SEC. 2. (a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after [May 14, 1947]), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to [May 14, 1947], except an activity which was compensable by either—

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

Extract from the Fair Labor Standards Amendments of 1949 (c. 736, 63 Stat. 910, 29 U. S. C. 201, *et seq.*):

SEC. 3. (o) HOURS WORKED.—In determining for the purposes of sections 6 and 7 the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

* * * * *

SEC. 16. (c) Any order, regulation, or interpretation of the Administrator of the Wage and Hour Division or of the Secretary of Labor, and any agreement entered into by the Administrator or the Secretary, in effect under the provisions of the Fair Labor Standards Act of 1938, as amended, on the effective date of this Act, shall remain in effect as an order, regulation, interpretation, or agreement of the Administrator or the Secretary, as the case may be, pursuant to this Act, except to the extent that any such order, regulation, interpretation, or agreement may be inconsistent with the provisions of this Act, or may from time to time be amended, modified, or rescinded by the Administrator or the Secretary, as the case may be, in accordance with the provisions of this Act.

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No. 39

In the Supreme Court of the United States

OCTOBER TERM, 1955

JAMES P. MITCHELL, SECRETARY OF LABOR; UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

KING PACKING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE SECRETARY OF LABOR

SIMON E. SOBELOFF,
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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 39

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

KING PACKING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE SECRETARY OF LABOR

OPINIONS BELOW

The opinion of the district court (R. 11-14) is reported at 107 F. Supp. 369. The opinion of the court of appeals (R. 177-181) appears at 216 F. 2d 618.

JURISDICTION

The judgment of the court of appeals (R. 181-182) was entered on October 21, 1954. A timely petition for rehearing was denied on December 10, 1954 (R. 182). The petition for a writ of certiorari

was filed on March 9, 1955, and was granted on April 25, 1955 (R. 182). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES INVOLVED

Pertinent provisions of the Fair Labor Standards Act of 1938, as amended, c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910 (29 U.S.C. 201, *et seq.*), and the Portal-to-Portal Act of 1947, c. 52, 61 Stat. 84 (29 U.S.C. 251, *et seq.*), are set forth in the Appendix, *infra*, pp. 28-40.

QUESTION PRESENTED

Knifemen employed in respondent's meat-packing plant spend time, each workday, in sharpening the knives which they use in their jobs. This activity, which is indispensably and integrally related to the performance of their duties (butchering and trimming meat), is required by the employer to be done outside the scheduled eight-hour shift. Respondent provides a room and equipment for its accomplishment.

The question presented is whether this activity is a "principal," rather than a "preliminary" or "postliminary," activity within the meaning of the Portal-to-Portal Act, and hence compensable under the Fair Labor Standards Act.

STATEMENT

The Secretary of Labor brought this action to enjoin respondent from violating the overtime and record-keeping requirements of Sections 15(a)(2) and 15(a)(5) of the Fair Labor Standards Act of 1938, as amended, in the employment of production

workers, and from violating Section 15(a)(1) of the Act by making interstate shipments of the goods produced by such workers.

The alleged violations of the Act (R. 3-8) arise from respondent's admitted failure (R. 8-11) to pay for or record the time spent by so-called knifemen in sharpening the knives which they use in the performance of their work.

Respondent is an interstate meat packer (Complaint, par. IV, R. 4; answer, par. IV, R. 9), engaged in slaughtering, butchering, dressing, and distributing meat and meat products. It employs at its packing plant 70 or 80 persons, including 21 to 24 knifemen whose compensation rights are involved in this litigation. The knifemen perform various butchering operations, 12 or 14 of them working in the killing room and the remainder in the cutting room (Fdg. IV, R. 16).

Various knives (R. 26-31) and three types of electric saws (R. 163) are used in the butchering operations. Some of the knives are furnished by the knifemen under the terms of their employment. These are the boning, the shaving, the legging, and the skinning or siding knives (R. 31). The saws and the more expensive loin-pulling, ham-skinning, shoulder-trimming, and spare-rib knives are furnished by respondent (R. 31, 66, 153). All of the knives, as well as the saws, must be sharp—"razor sharp," as one knifeman put it (R. 149)—for the proper performance of the work. As respondent's production manager and one of the knifemen explained, a dull knife would slow down production,

which is conducted on an assembly-line basis (R. 51-56), affect the appearance of the meat as well as the quality of the hides (R. 91-92), cause waste (R. 79), and make for accidents (R. 91-92). Thus, "a knife to be of any practical value in a knife job has to be . . . sharp" (R. 45-46).

Though the entire cost of keeping the saws in proper condition is borne by respondent, the knifemen are required to "sharpen their own knives outside the scheduled shift of eight hours and for this activity [they] are not compensated" (R. 178; also, Fdg. VII, R. 17). "While King Packing has a rule permitting the knives it furnishes to be sharpened during regular shift hours, employees ordinarily sharpen them on their own time, because the exigencies of the production line make it impracticable to do so during shift hours" (R. 178). Respondent's production manager testified that company-owned knives are sharpened "some during working hours and some on their own [the knifemen's] time" (R. 74; see, also, R. 51).

Respondent provides a room, outfitted with an emery wheel and grindstone, where the knife-sharpening is performed (R. 48-49). This work, which consists of edging and beveling operations (R. 90, 102, 113, 126, 135, 146, 160), is ordinarily done in the morning before the scheduled shift (R. 109). Sometimes, however, it is done during the noon hour or after quitting time (R. 77, 87).[1]

[1] An employee is free to take his own knives home at the end of the workday and, assuming that he has the necessary equipment, to sharpen them before returning to work the

The number of knives that a knifeman ordinarily sharpens in the morning is "two to four" (R. 75). Some knifemen, however, sharpen as many as five or six knives (R. 110). At the time a man is hired for, or promoted to, a knife job, it is understood that he will be required to sharpen knives. He is expected to perform that task as well as other tasks connected with the job (R. 47, 161).

The knifemen are paid by the hour and, excluding the knife-sharpening time in controversy, they work eight hours a day, five days a week.[2]

The district court concluded that the principal activity which knifemen are employed to perform is "the killing, cleaning and cutting of carcasses"; that knife-sharpening is not a part of such principal activity but is merely "preliminary" or "postliminary"; and that it is accordingly excluded from coverage under the Fair Labor Standards Act by Section 4(a)(2) of the Portal-to-Portal Act (R. 19). It therefore ordered the action dismissed (R. 22).

The court of appeals affirmed, holding that, even if knife-sharpening were "indispensable to" or an integral part of the butchering work, it was nonetheless "preliminary" and beyond coverage (R. 179). In reaching this conclusion, it recognized

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following day. This is rarely done in practice, one reason being that the knife might have its edge dulled in the process of being carried back and forth. R. 137, 80.

[2] In addition to knife-sharpening, knifemen must repeatedly steel their tools throughout the workday. This activity is done during the eight-hour shift, *i.e.*, on company time, and is compensated for. (R. 178.)

that *Steiner* v. *Mitchell*, 215 F. 2d 171 (C.A. 6), certiorari granted, 349 U.S. 914 (No. 22, this Term), supports the opposite view (*ibid.*).

SUMMARY OF ARGUMENT

1. By its express terms, Section 4 of the Portal-to-Portal Act preserves the *future* compensability of "principal" activities. It is sharply distinguished from Section 2, which *retroactively* relieved an employer from liability for back pay "on account of *any* activity," unless its compensability had been fixed by contract or established custom. Other provisions of the Act similarly demonstrate that Congress, in dealing retrospectively with the declared "existing emergency" resulting from unexpected suits for back pay, did not propose to alter permanently or drastically the future operation of the Fair Labor Standards Act.

The "preliminary" or "postliminary" activities excluded from coverage by Section 4 are those which fall outside the scope of the employee's "principal activity or activities." Thus, it is not decisive, as the court of appeals assumed, that an employee activity is one required to be performed outside of regular shift hours. Such an activity is nonetheless covered when, as in the instant case, it is significant and productive work integrally and indispensably related to performance of the job.

2. The legislative history establishes that the "key words" of Section 4—"principal activity or activities"—were deliberately chosen by Congress with a view to assuring compensation for all em-

ployee activities which are an integral part of the job. The report which accompanied the legislation so declared. And the same report gave as an illustration of compensable activity the pre-shift preparation of tools and machines for use in the day's work on the production line—the very type of activity involved in this case. The point was further illustrated and emphasized in statements made by sponsors of the measure during debate.

The same history makes clear that the terms "preliminary" and "postliminary" refer not to activities which are integrally and indispensably related to performance of the employee's productive work, but only to incidental activities—the "walking, riding, or traveling" expressly mentioned in Section 4(a)(1); checking in or out; waiting in line to receive pay checks; changing clothes and washing up (when not functionally or indispensably related to productive work).

In short, while Section 2 was designed, as one Senator stated it, to wipe out pending portal-to-portal cases so far as "humanly possible," Section 4 aimed to guarantee the future compensability of all significant and productive work integrally related to the job. "[I]t is our opinion," said one of the members of the Senate subcommittee, "that those activities which are so closely related and are an integral part of the principal activity, indispensable to its performance, must be included in the concept of principal activity."

3. The Fair Labor Standards Amendments of 1949 provide further confirmation. New Section

3(o), excluding in certain defined circumstances clothes-changing and showering activities, demonstrates that, in other circumstances, these off-shift activities may constitute compensable "principal" activity. See *Steiner* v. *Mitchell*, 215 F. 2d 171 (C. A. 6), certiorari granted, 349 U. S. 914 (No. 22, this Term).

Moreover, Section 16(c) of the Amendments declares that existing administrative interpretations, not inconsistent with the Amendments, "shall remain in effect." Outstanding at the time, and implicitly ratified by Congress, was the Administrator's interpretation that certain "preparatory activities" which the Administrator had always regarded as work and compensable under the Fair Labor Standards Act "remain so under the Portal Act . . ." Cf. *Mancja* v. *Waialua Agricultural Co.*, 349 U. S. 254, 270.

ARGUMENT

The Sharpening of Knives Is an Employee Function Integrally and Indispensably Related to the Knifemen's Butchering and Meat-Trimming Work. It Accordingly Constitutes a "Principal Activity" Within the Meaning of Section 4 of the Portal-to-Portal Act, Compensable Under the Fair Labor Standards Act

On this record, there is no room for dispute that the off-shift sharpening of knives is an indispensable and integral part of the butchering and knife-trimming work performed by knifemen in respondent's plant (*supra*, pp. 3-5). The court below did not reach a contrary conclusion as to the facts. It deemed immaterial the close and vital

relationship between the sharpening of the knives and their actual use in butchering. For the court of appeals, the decisive consideration was that it conceived the Portal-to-Portal Act as designed to eliminate the compensability of all activities performed off the production line, before or after the scheduled workday.

In our view, this interpretation of the statute is fundamentally in error and is caused largely by a failure to draw a clear distinction between the provisions of the Act relating to claims antedating the statute and the provisions having prospective operation. We shall urge that, so far as the future was concerned, Congress provided for the compensability of all activities which are so closely and integrally related to the principal work of the employee as to be deemed an essential part of it, irrespective of whether they are performed on shift or off shift. Its purpose was to exclude from future coverage only those activities whose relation to the principal activity of the employee is casual, indirect, or remote. This is borne out by the statutory language and scheme of the Portal-to-Portal Act and finds overwhelming confirmation in a legislative history which is not only unusually graphic and abundant but is focused directly on the type of problem here involved. The conclusion is further supported by the 1949 amendments to the Fair Labor Standards Act.

A. *Under the Portal-to-Portal Act's Criteria Relating to Future Liability, Activities Performed Off Shift Are Compensable if They Fall within the Scope of the Employee's "Principal Activity or Activities."*

The Portal-to-Portal Act was adopted in 1947 primarily to meet an "existing emergency" resulting from claims which, if allowed, would have created "wholly unexpected liabilities, immense in amount and retroactive in operation." Secs. 1(a)(b), 29 U. S. C. 251(a)(b). As we shall indicate, however, a sharp distinction is to be drawn between the broad exclusionary standard adopted in relation to suits for back pay for alleged pre-Portal Act violations (Sec. 2) and the discrete, more liberal, set of criteria governing future (*i. e.*, post-enactment) rights of compensation (Sec. 4). In this case, it is only Section 4 which is involved.

Section 4[3] exempts from application of the Fair

[3] The Section declares in pertinent part:

Section 4(a). Except as provided in subsection (b), no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, * * * on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after the date of the enactment of this Act—

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities,

which occur either prior to the time on any particular

Labor Standards Act of 1938 activities which are preliminary or postliminary to the employee's "principal activity or activities." It does not exempt all activities performed prior or subsequent to the employee's regularly scheduled workday or work shift, although, if that had been the purpose of Congress, it would have been a simple matter to say so. That Congress chose, instead, to exclude only that which comes before or after the commencement or termination of the employee's *principal activities* gives strong indication, on the face of the statute, that the lawmakers were well aware that in many situations employees might be required to perform, before or after regular hours, work for which they should be compensated.

In striking contrast, it should be noted, Congress provided in Section 2,[4] relating to liability for back

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workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

[4] The relevant portion reads as follows:

Sec. 2. (a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after [May 14, 1947]), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to [May 14, 1947] except an activity which was compensable by either—

(1) an express provision of a written or non-written contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such

(pre-1947) pay, that the employer would not be liable "on account of any activity" unless the compensability of such activity had been fixed by an express provision of contract or by an established custom.

Other provisions of the Portal-to-Portal Act similarly show that Congress, in dealing with the declared "existing emergency," did not propose to alter drastically and permanently the future operation of the Fair Labor Standards Act. Thus, Section 3 (*infra*, pp. 33-34), which relaxed the settled rule that claims for wages or liquidated damages under the Fair Labor Standards Act cannot be compromised or waived, see *Overnight Motor Co.* v. *Missel*, 316 U. S. 572; *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697, was carefully drawn so as to apply only to claims based on "activities engaged in prior to the date of the enactment of this Act."[5] And Sections 9 and 10 (*infra*, pp. 36-38), relating to "good faith" defenses, likewise differentiate between past and future claims. Reliance upon "*any* administrative regulation, order, ruling, approval, or interpretation, of *any* agency of the

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activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

[5] Significantly, no compromise of wage claims arising in the future is authorized. And Section 11 (*infra*, pp. 38-39) makes the award of liquidated damages in an employee action under the Fair Labor Standards Act a matter for the sound discretion of the court.

United States" (Sec. 9; emphasis added), is made a defense to past claims. But Section 10 provides that in the future it must be shown that reliance was placed upon a written regulation, order, etc., issued on the authority of specified officials of the Department of Labor.

It is thus plain from the scheme and structure of the Act that the broad exclusionary standard adopted in relation to past claims is not to be carried over in adjudication of claims arising subsequent to the Act. Whatever ambiguity may exist as to the scope of the phrase "principal activity or activities," a term used only in relation to future claims, is resolved by the legislative history to which we now turn.

B. *The Legislative History Establishes the Purpose of Congress to Require Compensation for Activities which Are an Integral Part of the Employee's Principal Work, Whether Such Activities Are Performed Before, During, or After the Scheduled Workday.*

The Senate Report accompanying the Portal-to-Portal Act (S. Rept. No. 48, 80th Cong., 1st Sess.) declared (p. 48) that "[t]he term 'principal activity or activities' includes all activities which are an integral part thereof . . ."[6] The Report

[6] Though the Portal-to-Portal Act had its origin in a bill introduced by Congressman Gwynne, Section 4, the provision here involved, was added by the Senate. The original Gwynne bill contained no comparable section (H. Rept. 326, 80th Cong., 1st Sess., p. 12).

then provides two specific examples of what is intended (*ibid.*):

> (1) In connection with the operation of a lathe an employee will frequently at the commencement of his workday *oil, grease, or clean his machine, or install a new cutting tool. Such activities are an integral part of the principal activity*, and are included within such term.
>
> (2) In the case of a garment worker in a textile mill, who is required to report 30 minutes before other employees report to commence their principal activities, and who during such 30 minutes distributes clothing or parts of clothing at the workbenches of other employees and *gets machines in readiness for operation* by other employees, such activities are among the principal activities of such employee. [Emphasis added.][7]

The meat cutter, when sharpening the knives essential to his work, is plainly no less engaged in "an integral part of the principal activity" than the "lathe operator" who, "at the commencement

[7] Petitioner in No. 22 points out (Br., pp. 22-23) that Representative Gwynne stated, after Section 4 had been added by the Senate, that the laying out of clothing by garment workers would not be compensable in the absence of an agreement or custom. This is directly contradicted by the examples given in the Senate Report, *supra*. It is to be emphasized that the Senate subcommittee added Section 4, and that Representative Gwynne's original bill had no equivalent. To the extent that Representative Gwynne's statements suggest that the standards of Sections 2 and 4 are the same, they are refuted both by the statutory language and by the repeated statements (see *infra*, pp. 19-21) of those who sponsored Section 4.

of the workday," must "oil, grease, or clean his machine, or install a new cutting tool."

The Congressional purpose in adopting the term "principal activity or activities" was very fully explained on the floor. Senator Cooper,[5] one of the sponsors of the legislation, stated (93 Cong. Rec. 2297) "that in the use of the words 'principal activity' we have preserved to the employee the rights and the benefits and the privileges which have been given to him under the Fair Labor Standards Act, because it is our opinion that those activities which are so closely related and are an integral part of the principal activity, indispensable to its performance, must be included in the concept of principal activity." Senator McGrath thereupon declared (*ibid.*):

> Mr. McGrath: I think that at this point we might very definitely make contribution to the legislative history of what we are doing here. Am I correct in understanding the Senator to say that what the majority of the committee proposes is that any activity of a worker shall be considered a part of his principal activity if the doing of that act is indispensable to the performance of the rest of his day's work?

Senator Cooper replied by giving the two examples appearing in the Senate Report, set out above. Pursuing the matter further, Senator Mc-

[5] Senator Cooper was a member of a three-man subcommittee of the Committee on the Judiciary which conducted hearings on the measure (93 Cong. Rec. 2124) and formulated the Senate version. (93 Cong. Rec. 2131; 93 Cong. Rec. 2293).

Grath posed the case of a worker in a chemical factory whose duties require him to put on special clothing at the beginning of the workday and to shower at its conclusion—a type of activity which is indispensable but which must necessarily be performed while the employee is off the production line." The colloquy is as follows (*id.*, p. 2298):

> Mr. McGrath: There are innumerable instances of operations which have to be performed that are not covered in these two particular examples. I think of one at the moment. In certain of our chemical plants workers are required to put on special clothing and to take off their clothing at the end of the workday, and in some of the plants they are required to take shower baths before they leave. Does the Senator regard such activity as that as coming within the compensable workday?
>
> Mr. Cooper: I am very happy that the Senator has asked the question, because I believe it gives the opportunity of drawing a fine distinction between the type of activity which we consider compensable and the type which should not be compensable. *In accordance with our intention as to the definition of "principal activity," if the employee could not perform his activity without putting on certain clothes, then the time used in changing into those clothes would be compensable as part of his principal activity.* On the other hand, if changing clothes were merely a convenience to

> the employee and not directly related to the specific work, it would not be considered a part of his principal activity, and it follows that such time would not be compensable. [Emphasis added.]

Senator Barkley was likewise concerned that the use of the words "preliminary" and "postliminary" should not be deemed to imply that an indispensable off-shift activity was unprotected by the Fair Labor Standards Act. Thus, he posited the following case (93 Cong. Rec. 2350):

> Mr. BARKLEY: * * * The other day * * * I asked whether a certain situation which I described would be covered, and if so, to what extent and in what manner. Suppose that a man is a machinist or a mechanic of some kind. *. *. * He is required to enter upon the actual labor, which might be termed his principal employment, at 8 o'clock in the morning and to spend 8 hours at such principal employment. But let us suppose that his employer requires him to be on the grounds and within the shop at 7:30 in the morning in order that he may spend half an hour *sharpening and preparing the tools with which he himself or his colleagues in the factory are to work.* * * *.
>
> Is that a part of his principal employment, or is that preliminary; or, if he is required to do it after the close of the shop in the afternoon, is that a part of the "postliminary" work for which there is to be no compensation unless

there is a contract or unless it has been the practice and custom for the employer to pay for the extra work done at his command?

* * * * *

Mr. COOPER: The distinguished Senator has perhaps not had the opportunity to read the report of the committee. Let me say that on page 48 of the report of the committee that exact situation, or one as nearly comparable to it as probably could be cited, is discussed. In the report it is clearly stated that under such circumstances *it is the intention of the framers of the bill that such activities shall be compensable, as a part of the principal activity.* [Emphasis added.]

Senator Barkley's example of "sharpening and preparing the tools" is, of course, precisely descriptive of the activity here in issue.

The legislative materials also indicate that the underlying economic rationale of Section 4 was to distinguish between activity which is incidental and non-productive (though, doubtless, related to employment) and activity indispensably related to the productive process. Thus, the same Senate Report which declared that the cleaning and oiling of tools and machinery would be compensable (see *supra*, p. 14) gives the following examples of non-compensable activities (S. Rept. No. 48, *supra*, p. 47): "Checking in or out and waiting in line to do so; changing clothes, washing up or showering,

waiting in line to receive pay checks."[9] Senator Cooper further explained on the floor (93 Cong. Rec. 2300) that the aim of Section 4 was to eliminate the requirement of "unearned" compensation for activities of the employee "which in no way enter into the production of goods" and would add "to the cost of goods * * * to the consumer." The bill, he emphasized (*ibid.*), "would preserve to the worker the rights he has gained under the Fair Labor Standards Act."

The sharp distinction which the lawmakers drew between Section 2 and Section 4 likewise shows that drastic curtailment of future rights of compensation was not intended, and that the term "principal activity" must be deemed to cover all employee activities integrally and indispensably related to the productive process.

The aim of Section 2 was to wipe out the large number of "existing portal-to-portal cases" which had been filed following this Court's decision in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680. See 93 Cong. Rec. 2125, 2126, 2293, 2295. As Senator Donnell explained (*id.*, pp. 2125-2126):

> But the real purpose of this proposed legislation [Section 2] is to dispose of the existing portal-to-portal cases, and we do not see any way to do except to take the entire activities of the entire 24-hour day, and provide by law

[9] The reference to clothes changing and showering is to be compared with Senator Cooper's explanation (see p. 16, *supra*) that in certain circumstances, *e.g.*, in a chemical plant, these activities would be compensable.

that none of them shall be compensable unless by contract or custom.

* * * * *

I should say that recognizing the grave economic problem, what we do is to undertake to wipe out all pending portal-to-portal cases, so far as it is humanly possible to do so. *In order to do that, we find it necessary to provide that any activity which is not compensable, either by contract, or by custom or practice not inconsistent with the contract, shall not be compensable.* [Emphasis added.]

The "key words" in Section 4, as pointed out by Representative Walter (one of the House Managers when the bill went to conference), are "principal activity or activities" (93 Cong. Rec. 4389). They were designed to apply to future claims a different and far more liberal rule than that made applicable to past claims. The same point is fully developed in the following colloquy between Senator Pepper and Senator Cooper (93 Cong. Rec. 2299):

Mr. PEPPER: The Senator has referred in his discussion with the Senator from Rhode Island to page 48 of the report of the committee, where there are set forth two instances of activities which are so interrelated to principal activities that they could be construed as principal activities and therefore compensable.

* * * * *

If I correctly understand the Senator, those incidental activities are to be construed under [the] part * * * of the bill dealing with *future claims as compensable work*, as principal activities. Is that correct?

Mr. COOPER. Excluding the use of the word "incidental." I do not think those activities are incidental. I think they are an integral part of the employment.

Mr. PEPPER. I should like to ask the able Senator from Kentucky: Would workers who *have been* engaged in such activities as we have just been discussing be precluded under [the] part * * * of the committee bill, dealing with *existing* claims, from recovery for such work?

Mr. COOPER. Exactly. [Emphasis added.] [10]

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[10] Senator Donnell's explanation of the bill likewise draws a careful distinction between 'past claims' (Section 2) and future rights' (Section 4):

"Mr. President, we were discussing part II of the bill. I may say, as previously indicated, that part II relates to existing claims. The purpose of part II is to deal solely with claims which exist at the time of the enactment of the pending measure.

"The Senate will observe in due time that *the approach which we make in the bill is quite different in the case of existing claims as contradistinguished from claims arising in the future*." (93 Cong. Rec. 2179.)

"Mr. President, I have analyzed part II of the act, which relates, as I have indicated, to existing claims. *I now come to part III, which relates to future claims. Here, as I have indicated, we have approached the subject matter from quite a different angle.* We have taken the position under part II that in the first place we should extinguish, cancel, annul, and

In summary, the legislative materials and history plainly show that, while Congress proposed to declare non-compensable an employee's incidental and unproductive activities, it also aimed to assure compensation for all activities which are a part of the productive process or integrally and indispensably related thereto. The very examples of compensable activity set forth in the Senate Report and stressed on the floor by the sponsors—including, particularly, the case of the worker who readies his tools or machine before the commencement of the regular workshift—perfectly describe the case at bar. By the same token, the history of the Act refutes unmistakably the court of appeals' view that an activity indispensably related to the productive process is to be deemed "preliminary" or "postliminary" merely because it is performed outside of the regularly scheduled hours spent on the production line.

As the foregoing history also shows, there is no

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make unenforcible the collection of moneys in portal-to-portal suits. * * *" (93 Cong. Rec. 2181.)

* * * * * * *

"I was about to proceed to part III, which relates to future claims, that is to say, which governs employees in their relations with the employers after the enactment of this legislation. It determines what activities are compensable and what are not.

"Mr. President, here we have come to the conclusion that we do not legislate as to the entire 24-hour period, for if we do it may well be, and in fact will be, that we shall have legislated out of existence some claims which may bring about an injustice to the plaintiffs therein." (93 Cong. Rec. 2181.) (Emphasis added.)

reason to believe, as the court of appeals erroneously assumed (R. 179-180), that Congress broadly intended to make permanently non-compensable all of the activities (including the assembling and sharpening of tools) which this Court passingly described as "preliminary" in the course of its *Mt. Clemens* opinion (328 U.S. at 692-693). At that time, this Court was not using the word "preliminary" as a word of art or as a statutory term, and it was not, of course, considering the word in relation to the term "principal activity." [11] More pointedly, Congress, as observed above, expressed its purpose to preserve the compensability of some of the very activities (*e.g.*, the preparation of tools) characterized as preliminary in *Mt. Clemens*. Plainly, then, the meaning which Congress ascribed to the words "preliminary" and "principal" must

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[11] The issue in *Mt. Clemens*, which involved a pottery manufacturer, was whether the activities in question constituted "work" under the then outstanding tests. Since those tests were based on factors other than the relationship of activities to the employee's "principal" employment, it cannot be determined from the decision how essential the various activities there involved were to the making of pottery. For all that appears, many of the activities may have been of only incidental importance and far less closely related to the making of pottery than is the sharpening of knives to the butchering and trimming of meat. Note, in this connection, that all of the various "preliminary" activities in that case did not consume more than three or four minutes a day at the most (328 U.S. at 683). Indeed, with respect to the activity described as "assembling and sharpening tools," it appeared on remand that there was nothing to it. See the finding in *Anderson v. Mt. Clemens Pottery Co.*, 69 F. Supp. 710, 715 (E.D. Mich.): "There is no evidence that these employees had to assemble and sharpen their tools."

be derived from their context in the statute and from the specific legislative explanations rather than from this Court's earlier, passing use of one of those words in another context.

The court of appeals' reliance upon House Report No. 71, 80th Cong., 1st Sess., and a group of cases decided under Section 2 (see R. 179-180) is misplaced. The cited report deals with the original House version of the Portal-to-Portal Act, which made no distinction between past and future claims (see p. 13, note 6, *supra*), and is accordingly of no aid in interpreting Section 4, which was subsequently added by the Senate. And, as already indicated, the Section 2 cases are not in point because they involve application of a different statutory standard—one which eliminated claims based on *any* activity which was not made compensable by a fixed provision of contract or by established custom.[12] See *Steiner* v. *Mitchell*, 215 F. 2d 171, 173 (C.A. 6) (pending as No. 22, this term), a proceeding under Section 4 in which the court refused to consider the Section 2 cases upon which the employer relied.[13]

[12] Section 2 not only excluded from coverage activities not made compensable by contract, custom, or practice, but divested the courts of jurisdiction to entertain suits based on such activities. Most of the decisions under Section 2 deal with the sufficiency of pleadings to satisfy jurisdictional requirements. See, *e.g.*, *Mackert* v. *Swift & Co.*, 173 F. 2d 517, 520-521 (C.A. 2).

[13] Decisions under Section 4 are few in number, though various suits are pending or in the offing. The following cases, in addition to the instant case, deal with the meaning of the Section's terminology: *Tobin* v. *Alma Mills*, 92 F. Supp. 728

C. The 1949 Amendments to the Fair Labor Standards Act Confirm the Conclusion that Section 4 of the Portal-to-Portal Act Did Not Exclude from Coverage All Activities Performed Outside the Hours Spent on the Production Line.

The Fair Labor Standards Amendments of 1949 confirm the view that Section 4 of the Portal-to-Portal Act does not exclude from coverage all activities performed outside the hours spent on the production line.[14] Thus, new Section 3(o) (*infra*, p. 39) provides that in computing hours of employment "there shall be excluded any time spent

(W.D. S.C.), modified on other grounds, 192 F. 2d 133 (C.A. 4), certiorari denied, 343 U.S. 933, declaring the cleaning of spinning frames by mill workers to be a "principal activity" though performed outside of regular shift hours; *Mitchell* v. *Southeastern Carbon Paper Co.*, 12 WH Cases 559 (C.A. 5, June 28, 1955), holding non-compensable bathing and clothes-changing activities of employees in a carbon-paper plant; *Steiner* v. *Mitchell*, 215 F. 2d 171 (C.A. 6), certiorari granted, 349 U.S. 914 (No. 22), holding similar activities in a battery plant to be compensable; *Cieminoczolowski* v. *Q. O. Ordnance Corp.*, 12 WH Cases 469 (C.A. 8, April 29, 1955, petition for rehearing pending), holding non-compensable similar activities in an explosives manufacturing plant; *McComb* v. *C. A. Swanson & Sons*, 77 F. Supp. 716 (D. Neb.), holding non-compensable similar activities in a food-processing plant. See also *Gemath* v. *National Biscuit Co.*, 81 F. Supp. 213, 214 (S.D. N.Y.), appeal dismissed, 177 F. 2d 963 (C.A. 2), allowing employees in a dismissed Section 2 case to file a supplemental complaint for subsequent claims on the ground that the "statutory standard for compensable activities engaged in after the effective date of the Act is different from that applicable to activities prior thereto."

[14] "It is settled that 'subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject'." *Great Northern Ry. Co.* v. *United States*, 315 U.S. 262, 277; *Sarles* v. *United States*, 152 U.S. 570, 576.

in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee." The exclusion in certain defined circumstances, of clothes-changing and showering activities shows that, in other circumstances, these pre-shift and post-shift activities may meet the test of compensability. This was recognized by the Court of Appeals for the Sixth Circuit in holding that essential clothes changing and showering by employees working with toxic materials in a battery plant is compensable "principal activity." *Steiner* v. *Mitchell*, 215 F. 2d at 173 (pending as No. 22, this Term).

Moreover, Section 16(c) of the 1949 Amendments declares that existing administrative interpretations, not inconsistent with the Amendments, "shall remain in effect." Outstanding at the time was the Administrator's interpretation that certain "preparatory activities [those 'closely related to a principal activity' and 'indispensable to its performance'], which the Administrator has always regarded as work and as compensable under the Fair Labor Standards Act, remain so under the Portal Act * * *." Among such activities the Administrator expressly included the two examples cited in Senate Report No. 48, 80th Cong., 1st Sess., page 48, and Senator Cooper's example of necessary clothes-changing and bathing activities in a chemical plant (*supra*, pp. 14, 16-18). See *General*

Statement as to the effect of the Portal-to-Portal Act of 1947 on the Fair Labor Standards Act of 1938, p. 13 (29 C.F.R. 790, at 790.8, 12 F.R. 7655). This administrative interpretation was specifically brought to the attention of Congress in connection with proposed Section 3(o).[15] Congress made no change affecting this interpretation save for the limited exception from coverage written into Section 3(o)—an exception, as observed above, premised upon the view of the law expressed in the interpretation. The Administrator's interpretation, thus ratified by Congress, remained in force. Section 16(c). *See Alstate Construction Co. v. Durkin*, 345 U.S. 13, 16-17; *Maneja v. Waialua Agricultural Co.*, 349 U.S. 254, 270.

[15] See letter of William A. Quinlan, General Counsel, Associated Retail Bakers of America, printed in Hearings before a Subcommittee of the Committee on Labor and Public Welfare, United States Senate, 81st Cong., 1st Sess., on S. 58, S. 67, S. 92, S. 105, S. 190, S. 248, and S. 653, p. 1173, at 1175-1179.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

Statutory Provisions Involved.

Fair Labor Standards Act of 1938, as amended, c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910 (29 U. S. C. 201 *et seq.*):

* * * * *

Sec. 7. (a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Sec. 11. * * *

(c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

SEC. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation; and except that any such transportation, offer, shipment, delivery, or sale of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer that the goods were produced in compliance with the requirements of the Act, and who acquired such goods for value without notice of any such violation, shall not be deemed unlawful;

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14;

* * * * *

(5) to violate any of the provisions of section 11 (c) or any regulation or order made or continued in effect under the provisions of section 11 (d), or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

SEC. 17. The district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands shall have jurisdiction, for cause shown, to restrain violations of section 15: *Provided*, That no court shall have jurisdiction, in any action brought by the Administrator to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action.

Portal-to-Portal Act of 1947, 61 Stat. 84, 29 U. S. C. 251 *et seq.*:

* * * * *

Part II

Existing Claims

SEC. 2. RELIEF FROM CERTAIN EXISTING CLAIMS UNDER THE FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED, THE WALSH-HEALEY ACT, AND THE BACON-DAVIS ACT.—

(a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after the date of the enactment of this Act), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to the date of the enactment of this Act, except an activity which was compensable by either—

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

(b) For the purposes of subsection (a), an activity shall be considered as compensable under such contract provision or such custom or practice only when it was engaged in during the portion of the day with respect to which it was so made compensable.

(c) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an employer employed an employee there shall be counted all that time, but only that time, during which the employee engaged in activities which were compensable within the meaning of subsections (a) and (b) of this section.

(d) No court of the United States, of any State, Territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after the date of the enactment of this Act, to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, under the Walsh-Healey Act, or under the Bacon-Davis Act, to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to an activity which was not compensable under subsections (a) and (b) of this section.

(e) No cause of action based on unpaid

minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, which accrued prior to the date of the enactment of this Act, or any interest in such cause of action, shall hereafter be assignable, in whole or in part, to the extent that such cause of action is based on an activity which was not compensable within the meaning of subsections (a) and (b).

SEC. 3. COMPROMISE OF CERTAIN EXISTING CLAIMS UNDER THE FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED, THE WALSH-HEALEY ACT, AND THE BACON-DAVIS ACT.—

(a) Any cause of action under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, which accrued prior to the date of the enactment of this Act, or any action (whether instituted prior to or on or after the date of the enactment of this Act) to enforce such a cause of action, may hereafter be compromised in whole or in part, if there exists a bona fide dispute as to the amount payable by the employer to his employee; except that no such action or cause of action may be so compromised to the extent that such compromise is based on an hourly wage rate less than the minimum required under such Act, or on a payment for overtime at a rate less than one and one-half times such minimum hourly wage rate.

(b) Any employee may hereafter waive his right under the Fair Labor Standards Act of 1938, as amended, to liquidated damages, in whole or in part, with respect to activities engaged in prior to the date of the enactment of this Act.

(c) Any such compromise or waiver, in the absence of fraud or duress, shall, according to the terms thereof, be a complete satisfaction of such cause of action and a complete bar to any action based on such cause of action.

(d) The provisions of this section shall also be applicable to any compromise or waiver heretofore so made or given.

(e) As used in this section, the term "compromise" includes "adjustment", "settlement", and "release."

Part III

Future Claims

SEC. 4. RELIEF FROM CERTAIN FUTURE CLAIMS UNDER THE FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED, THE WALSH-HEALEY ACT, AND THE BACON-DAVIS ACT.—

(a) Except as provided in subsection (b), no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of

such employee engaged in on or after the date of the enactment of this Act—

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities,

which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

(b) Notwithstanding the provisions of subsection (a) which relieve an employer from liability and punishment with respect to an activity, the employer shall not be so relieved if such activity is compensable by either—

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

(c) For the purposes of subsection (b), an activity shall be considered as compensable under such contract provision or such custom or practice only when it is engaged in during the portion of the day with respect to which it is so made compensable.

(d) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an employer employs an employee with respect to walking, riding, traveling, or other preliminary or postliminary activities described in subsection (a) of this section, there shall be counted all that time, but only that time, during which the employee engages in any such activity which is compensable within the meaning of subsections (b) and (c) of this section.

* * * * *

SEC. 9. RELIANCE ON PAST ADMINISTRATIVE RULINGS, ETC.—In any action or proceeding commenced prior to or on or after the date of the enactment of this Act based on any act or omission prior to the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act

or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

SEC. 10. RELIANCE IN FUTURE ON ADMINISTRATIVE RULINGS, ETC.—

(a) In any action or proceeding based on any act or omission on or after the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in subsection (b) of this section, or any administrative practice or enforcement policy of such agency with respect

to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

(b) The agency referred to in subsection (a) shall be—

(1) in the case of the Fair Labor Standards Act of 1938, as amended—the Administrator of the Wage and Hour Division of the Department of Labor;

(2) in the case of the Walsh-Healey Act—the Secretary of Labor, or any Federal officer utilized by him in the administration of such Act; and

(3) in the case of the Bacon-Davis Act—the Secretary of Labor.

SEC. 11. LIQUIDATED DAMAGES.—In any action commenced prior to or on or after the date of the enactment of this Act to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liqui-

dated damages or award any amount thereof not to exceed the amount specified in section 16 (b) of such Act.

Fair Labor Standards Amendments of 1949 (c. 736, 63 Stat. 910, 29 U.S.C. 201, *et seq.*):

* * * * *

SEC. 3. (o) HOURS WORKED.—In determining for the purposes of sections 6 and 7 the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

* * * * *

SEC. 16. (c) Any order, regulation, or interpretation of the Administrator of the Wage and Hour Division or of the Secretary of Labor, and any agreement entered into by the Administrator or the Secretary, in effect under the provisions of the Fair Labor Standards Act of 1938, as amended, on the effective date of this Act, shall remain in effect as an order, regulation, interpretation, or agreement of the Administrator or the Secretary, as the case may be, pursuant to this Act, except to the ex-

tent that any such order, regulation, interpretation, or agreement may be inconsistent with the provisions of this Act, or may from time to time be amended, modified, or rescinded by the Administrator or the Secretary, as the case may be, in accordance with the provisions of this Act.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 39

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor,
Petitioner,

vs.

KING PACKING COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for King Packing Company

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 39

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor,
Petitioner,

vs.

KING PACKING COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for King Packing Company

QUESTION PRESENTED

Section 4(a)(2) of the Portal Act exempts from the minimum wage and overtime compensation requirements of the Labor Standards Act "*any*" activities "preliminary to or postliminary to" the employee's principal activity. Does this exclusion apply merely to those preliminary or postliminary activities which are incidental and unnecessary to the principal activity?

SUPPLEMENTAL STATEMENT OF THE CASE

The record establishes without contradiction that the custom for at least the last 20 years at respondent's plant has been that the knifemen appear at work with sharp knives, and that knifemen are only compensated for that work which is directly supervised and required by the employer (R. 60, 153-54).[1] Their rate of compensation—necessarily reflecting this custom—is arrived at by collective bargaining (Pl. Ex. 11, R. 32). The Secretary of Labor charges that this long-settled custom is a violation of the Labor Standards Act (Complaint, par. VI, R. 5).

This arrangement, which has proved satisfactory for 20 years, balances the needs and preferences of the knifemen against those of the employer. The knifemen have different methods of sharpening their knives and prefer to sharpen and use their own knives exclusively (Fdg. VIII, R. 17; 63, 72, 80, 102, 122, 139). As respondent's production manager stated: "[Y]ou won't find two men that sharpen knives alike." (R. 71). "[T]hey don't want anybody sharpening their knives, each seems to have a little different taste, each man takes a good deal of pride in his knife and he doesn't care for anyone to monkey with it. . . . [S]ome might like [the edge on their knives] feathered, and some like it smooth." (R. 63). If they trade a knife "they shape it up the way they like it" (R. 63). The testimony of the knifemen clearly shows that they consider the knives their individual tools to care for and use in their own way (R. 122, 139).

The respondent itself owns more costly knives and so has an emery stone and grinding wheel in the plant (Fdg. VII,

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1. References to the printed transcript of record filed with this Court are designated "R." Whenever in a series of references a semicolon appears, references preceding the semicolon are to the findings or opinion of the trial judge; succeeding references are to the supporting evidence.

R. 17; 48-49, 62-63, 105, 157, 162). As a convenience the knifemen commonly use this equipment to sharpen their own knives (Fdg. VII, R. 17; 48-49, 62-63, 105, 157, 162).

Knife sharpening by the employees consumes an average of 10.4 minutes per day (Fdg. XI, R. 18; 70). This time varies from day to day and from man to man. The men use different numbers of knives from day to day (R. 88, R. 110, R. 124, R. 131, R. 140, R. 148). Different men performing different operations will use from 3 to 6 knives a day (R. 88, R. 110, R. 124, R. 131, R. 140, R. 148). Knife sharpening time for different men varies greatly depending upon their skill—"the better butchers sharpen their knives in as little as 3 minutes and on down to the poor knife man and he takes as long as 20 minutes or a half hour" (R. 70. See also R. 74-75, R. 88, R. 109-110, R. 117, R. 118, R. 120, R. 125, R. 133, R. 141, R. 142, R. 148). And the fact that different men prefer different edges will affect the amount of knife sharpening time—"What one employee might consider a sharp edge another might consider dull? Yes sir, that is right" (R. 80).

The knifemen are free to sharpen their knives at any place, at any time outside regular working hours, and in any manner or by any method they choose (Fdgs. VII, VIII, R. 17; 62-63, 105, 157, 162). Respondent does not specify the degree of sharpness of the knives, or the type of edge the knife should have (Fdg. VIII, R. 17; R. 71, 156, 169). Respondent exercises no discipline or control whatsoever over the sharpening room or the activities of the knifemen while they are sharpening their knives (Fdg. VIII, R. 17; 63, 67, 108, 120, 156).

On the basis of these facts the Trial Court found (1) that the principal activity or activities which the respondent's knifemen are employed to perform are the killing, cleaning

and cutting up of carcasses of cattle and hogs, and (2) that the sharpening of knives by the knifemen outside their regularly scheduled shift time is preliminary and postliminary to such principal activity or activities which they are employed to perform (Fdgs. XIII, XIV, R. 18, 19). Commenting in his opinion on the evidence supporting these findings of fact, Judge Healy stated:

> "The evidence is that [the knifemen] are employed to perform work in the killing and cutting rooms of the plant in the slaughter of cattle and hogs, and in the cleaning and cutting up of the carcasses. These are their principal activities. They are obviously not employed to sharpen knives. The knives are their own tools with which they are required by the terms of their employment to equip themselves for the proper performance of the work they are employed to do." (R. 12)

He accordingly concluded, after finding further that off-shift knife sharpening is not compensated by contract or custom in respondent's plant and is materially different from other operations performed during regular working hours and customarily compensated, that the time spent by employees in sharpening their knives outside regularly scheduled shift time is not compensable under the Labor Standards Act as modified by the Portal Act (Fdgs. IX, XII, Concl. VI, R. 17-18; 20).

The decision of the Trial Court was unanimously affirmed by the Court of Appeals for the Ninth Circuit (R. 179-182). Judge Orr, speaking for the Court, noted that the Portal Act was passed by Congress subsequent to the decision in *Anderson v. Mt. Clemens Pottery Co.*[2] "with the purpose in mind, among other things, of making non-compensable certain preliminary activities, which the *Mt. Clemens* case had

2. 328 U.S. 680; 66 S.Ct. 1187 (1946).

held to be compensable" (R. 179). To accept the contention of the Secretary of Labor that all activities which are "indispensable to the performance of productive work" are principal activities which must be compensated in accordance with the Labor Standards Act would, he concluded, "deny effect to the intended meaning of the Portal-to-Portal Act" since "all of the activities designated as 'preliminary' by the Supreme Court in the *Mt. Clemens* case can be considered indispensable" (*Id.*). For these reasons, and on the basis of the findings of the Trial Court that the knife sharpening performed by respondent's employees is in fact preliminary and postliminary to their principal activities, that it is not compensable by contract or custom, and that it is essentially different from their customarily compensable work, the Court held that off-shift knife sharpening performed by respondent's employees falls within the exclusion to the provisions of the Labor Standards Act created by Section 4 of the Portal Act.

SUMMARY OF ARGUMENT

1. Section 4 of the Portal Act expressly excludes from the minimum wage and overtime requirements of the Labor Standards Act "any" activities "preliminary to or postliminary to" the principal activities "which such employee is employed to perform." The statute should be construed accordingly to exclude the pre-shift knife sharpening in this case. The Portal Act makes no distinction between indispensable and dispensable (i.e. between necessary and unnecessary) preliminary activities.

2. It is a question of fact whether any particular activity is preliminary (or postliminary) or principal. The Courts below found on adequate evidence that the knife sharpening was preliminary. They also found that the employee's principal activities were to work in the killing room and cutting

floor, killing and butchering, and not to work at sharpening knives in the knife sharpening room. Finally, the facts found show that the knife sharpening was not required to be performed at the plant and is indispensable only in the sense that rising, eating and travelling to the plant are indispensable.

3. Interpretation of the statute according to its common sense meaning is also compelled by its purpose as shown by Section 1 of the Act and by its legislative history. These show that Congress intended to prevent future unexpected claims as well as to deal with the "existing emergency." Congress was not repudiating this purpose *sub silentio* in treating accrued claims separately from future claims. We agree that Section 2 of the Portal Act (relating to accrued claims) is broader than Section 4 (relating to future claims): It does not follow as contended by petitioner, that Section 4 excludes only preliminary activities that are dispensable and unnecessary, i.e. not indispensable. Section 2 excluded liability for *all* non-principal activities even though they occurred during the shift. Section 4 excludes only non-principal activities occurring before or after the shift; but Section 4 excludes *all* such non-principal, preliminary or postliminary activities, whether or not indispensable.

4. The Congressional history affirmatively shows that Section 4 outlaws indispensable (as well as dispensable) preliminary and postliminary activities. There is an abundance of authority in the Congressional debates so showing. The few quotations taken out of context by petitioner show only that Senator Cooper loosely used the term "indispensable" to mean "integral."

5. The 1949 amendments to the Labor Standards Act do not imply that the statute means anything other than what it says. Section 3(o) was enacted to establish that the activi-

ties dealt with in collective bargaining contracts were not thereby withdrawn from the exclusion of Section 4. Section 16(c) preserves existing administrative interpretations *not inconsistent* with the statute. Petitioner's present interpretation is both inconsistent with the statute and inconsistent with other interpretations of the Wage and Hour Administrator.

ARGUMENT

I. The knife sharpening here is included within the meaning of "any" activity preliminary to the employee's principal activities and so is non-compensable.

A. THE STATUTE EXCLUDES ALL PRELIMINARY ACTIVITIES.

The statute is not obscure. It expressly excludes from the minimum wage and overtime pay requirements "any" activities which are "preliminary to or postliminary to" the principal activity or activities which the employee is employed to perform. The statute specifies that the excluded preliminary and postliminary activities are those "which occur either prior to the time of any particular work day at which such employee commences, or subsequent to any particular time at which he ceases such principal activity or activities." The statute says nothing about "indispensability": it is not limited to preliminary activities that are "dispensable" or unnecessary to the principal activity. Clearly, the activities excluded by the language of Section 4, in the absence of a contrary contract or custom, are *all* those activities which occur before or after the activities which the employee is hired to perform.

When, as here, Congress uses words which are in common use without providing a special definition, it is well settled that these words "are presumed to be used in their ordinary and usual sense, and with the meaning commonly attribut-

able to them." *De Ganay v. Lederer*, 250 U.S. 376, 381, 39 S.Ct. 524, 525 (1919).

> "After all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him." (*Addison v. Holly Hill Fruit Products*, 322 U.S. 607, 618, 64 S.Ct. 1215, 1221 (1944).)

This Court in the *Mt. Clemens Pottery Co.* case specifically characterized "sharpening tools" as "preliminary", 328 U.S. 680, 693, 66 S. Ct. 1187, 1195 (1946). The Court in *Markert v. Swift & Co.*, 173 F.2d 517, 520 (2d Cir. 1949) described the repairing or preparing tools of packing house employees for use as preliminary and postliminary activities. The Court in *Smith v. Cudahy Packing Co.*, 76 F. Supp. 575, 577 (D. Minn. 1947) described as "preliminary to the employees' principal activity" "sharpening knives and doing similar things necessary to the carrying out of [the employees'] work."

This usage accords with the meaning given in Webster's New International Dictionary which defines "preliminary" as "preceding the main business," "prefatory," "preparatory."

Judge Healey found the knife sharpening in this case to be a preliminary or postliminary activity, (Fdg. XIV, R. 19) and Judges Orr, Pope and Yankwich sitting as the Court of Appeals for the Ninth Circuit agreed. Surely the Trial Court in this case was entitled to attribute a meaning to "preliminary and postliminary" which accords with that given in a standard dictionary and the usage of 16 members of the federal judiciary.

Similarly, Congress did not, in enacting the Portal Act, define the phrase "principal activity or activities which

employees are employed to perform." However, as was pointed out in *McComb v. C. A. Swanson & Sons*, 77 F. Supp. 716, 731 (D. Neb. 1948):

> "Those words are not abstruse, obscure or uncertain. They refer to the productive work in behalf of the employer which he hires the worker to do. For the machinist, it is the work at his bench or lathe; for the store clerk, the sale of goods; for the carpenter the labor in the erection or repair of a building. And for a poultry eviscerator, it is the task to which he or she is assigned in the eviscerating room, be it the hanging of birds, decapitation, disemboweling, cleaning the room or any one or more the multitude of operations in the room's service. . . ."

In this case, the work which "the employer hires the worker to do" as the Trial Judge found, is the "killing, cleaning and cutting up of carcasses of cattle and hogs" (Fdg. XIII, R. 18), and not any preparatory activities they may be required to do. Neither Record nor Findings support the government's constant assertion of indispensability. True, the knife must be sharp. But it is not at all indispensable that it be sharpened at the plant or under the control of the Company. Moreover, the record affirmatively shows that the sharpening is done at the plant only in part and as a convenience, not as a requirement (Fdgs. VII, VIII, R. 17). Thus, the knife sharpening was indispensable solely in the sense that rising, eating and travelling to work were indispensable.

B. THE TRIAL COURT'S FINDINGS, SUPPORTED BY EVIDENCE AND AFFIRMED BY A UNANIMOUS COURT OF APPEALS, ARE CONCLUSIVE.

Every federal court which has had occasion to determine whether particular preliminary or postliminary activities are within the exclusion created by Section 4(a)(2) of the Portal Act has agreed that the question of what are the "principal activities" which employees are employed to perform is, of necessity, one of fact to be resolved by the Trial Judge on the basis of the circumstances in each individual case. As the Eighth Circuit pointed out in *Ciemnoczolowski v. Q. O. Ordnance Corp.*, 12 WH Cases 469, 55 A.L.C. 612, 614-615 (April 29, 1955):

> "The fact that the area embraced within the term 'principal activity' was not precisely defined by Congress necessarily resulted in a relegation of the question to the courts under facts peculiar to each case, applying the general principles laid down by Congress. . . . Whether a preliminary or postliminary activity, necessary to the performance of the 'principal activity' is an integral part of the principal activity is a question of fact to be determined from all the relevant evidence."

Similarly, in *Mitchell v. Southeastern Carbon Paper Co.*, 12 WH Cases 559, 55 A.L.C. 891, 894 (June 28, 1955) the Fifth Circuit concluded:

> "Just as the Supreme Court stated in the Portal-to-Portal cases that a determination of whether clothes changing and walking time, and like activities, were, prior to the enactment of the Portal-to-Portal Act . . . within the work week and thus compensable, was a question of fact, so here the determination as to whether the same activities are within the term 'principal activities' is one of fact."

In *Steiner v. Mitchell*, now before this Court the Sixth Circuit also recognized that the question of whether activi-

ties are "principal" activities which employees are employed to perform is necessarily dependent on the facts of each individual case. Thus the Court stated (215 F.2d 171 at p. 172):

> "The use of the phrase 'principal activity or activities' in the Statute suggests that the word 'principal' in some situations, may apply to more than a single type of activity, but, in view of the great variety of industrial conditions and various types of industries throughout the nation, it was obviously not practicable for the area embraced by the words 'principal activity or activities' to be precisely defined or marked out. The scope or reach of the phrase was left to be measured by the facts and circumstances involved in each industry."

In the *General Statement as to the Effect of the Portal-to-Portal Act of 1947 on the Fair Labor Standards Act of 1938*, 29 C.F.R. 790, 790.7(b), 12 F.R. 7655, 7658, the Administrator stated:

> "No categorical list of 'preliminary' and 'postliminary' activities except those named in the act can be made, since activities which under one set of circumstances may be 'preliminary' or 'postliminary' activities, may under other conditions be 'principal' activities."

Reiterating at another point in this same bulletin that "an activity which is a 'preliminary' or 'postliminary' activity under one set of circumstances may be a principal activity under other conditions", the Administrator gave as an illustration the following example:

> "Waiting before the time established for the commencement of work would be regarded as a preliminary activity when the employee voluntarily arrives at his place of employment earlier than he is either required or expected to arrive. Where, however, an employee is required by his employer to report at a particular hour

at his workbench or other place where he performs his principal activity, if the employee is there at that hour ready and willing to work but for some reason beyond his control there is no work for him to perform until some time has elapsed, waiting for work would be an integral part of the employee's principal activities. The difference in the two situations is that in the second the employee was engaged to wait while in the first the employee waited to be engaged." 29 C.F.R. 790.7(h), 12 F.R. 7659.

These statements are in strange contrast to the present position of petitioner. Petitioner now contends that the findings of the Trial Judge as to the principal activities must be overturned, though admittedly supported by competent evidence. Yet the circumstances of the instant case bear a striking resemblance to the example set forth above of the employee who is "waiting to be engaged". Respondent's knifemen own their own knives and they may sharpen them in any place, at any time, and in any manner they choose. Respondent does not require the knifemen to be physically present on its premises while they sharpen their knives and does not specify the length of time which the knifemen may spend in that operation. (See p. 3 *supra*). When the knifemen are using respondent's equipment and premises to sharpen their knives, they are, in the language of the Administrator's example, "preparing to be engaged"; they are not "engaged to prepare" for their principal activities on the production line.

All authorities thus point to the conclusion that the task of delineating the "principal activities" which particular employees are employed to perform is essentially a question of fact dependent on the circumstances of each individual case. The Trial Judge in this case has found that respondent's knifemen are employed to perform productive work

on the killing floor and in the cutting room of respondent's plant (*supra*, pp. 3-4). Time spent in sharpening their knives is preparatory to and not one of the principal activities which respondent employs them to perform (*supra*, p. 4).

These findings of the Trial Judge are, as the Court of Appeals recognized, amply supported by the evidence and must therefore be accepted as final. Fed. Rules of Civil Procedure, 28 U.S.C.A. Rule 52.

II. The petitioner's argument that "'principal activities" includes "indispensable activities" is without foundation. Petitioner's construction would bring back the conditions sought to be remedied by the Portal Act.

The petitioner would have this Court believe that his conclusion is compelled by (1) the fact that the Portal Act treats past and future claims differently, (2) the legislative history of the Act, and (3) subsequent amendments to the Labor Standards Act. However, the petitioner's argument disregards the purpose behind the different treatment of past and future claims, would defeat the very purpose for which the Portal Act was enacted, and is supported only by a few out-of-context quotations from the history of the Portal Act in Congress.

A. PETITIONER'S CONTENTION THAT PAST AND FUTURE CLAIMS ARE TREATED DIFFERENTLY IN THE STATUTE, WITH WHICH WE AGREE, DOES NOT SUPPORT HIS CONCLUSION THAT ONLY UNNECESSARY ACTIVITIES ARE EXCLUDED.

The Secretary of Labor correctly stated that Section 2 of the Portal Act relieves an employer from liability "on account of *any* activity" unless the compensability of such activity had been fixed by an express provision of contract or by an established custom. We agree that the exclusionary standard of Section 2 is broader than that of Section 4. The difference between Sections 2 and 4 was repeatedly explained in Congress:

> "The House bill bans all portal-to-portal claims, past and future, regardless of whether such claims are based on activities which occurred during the 'workday'—'whistle to whistle'. The Senate uses this approach only to past claims. As to future claims, however, activities occurring within the 'whistle to whistle' period are not affected by the Senate bill. Such activities are permitted to be treated as they have been, under the Fair Labor Standards Act. All activities, preliminary to or postliminary to the 'whistle-to-whistle' period are made noncompensable, unless by custom or contract." 93 Cong. Rec. 2084.

Senator Donnell, one of the members of the Subcommittee of the Senate Committee on the Judiciary which drafted the Portal Act[3], had the same understanding:

> "Now when we come to the future there is quite a different picture. Here we realize that it is important that the employees and the employers may, so far as possible, be free from the possibility of injustice throughout the regular workingday period, the time from the

3. Senators Donnell, Cooper and Eastland were the members of the Subcommittee of the Committee on the Judiciary which conducted hearings on the measure (93 Cong. Rec. 2124) and formulated the Senate version (93 Cong. Rec. 2131, 93 Cong. Rec. 2293).

whistle in the morning to the time of the whistle in the afternoon. Therefore we are not undertaking to legislate in Part III as to the workday proper; but we are legislating solely with respect to the preliminary activities, before the beginning of the workday, and the postliminary activities, after the conclusion of the workday, the two classes of claims with respect to which this past uncertainty has arisen in our economy. . . ." 93 Cong. Rec. 2181.

"It is also true that Part III which relates to future claims, does not legislate with respect to the period of the workday proper, as understood in common parlance." 93 Cong. Rec. 2182.

The Courts have construed Section 2 to allow recovery for principal activities performed off-shift[4]. But this does not imply that Section 4 must exclude only those activities not "indispensable" to the performance of the employee's principal activities. The essential difference between Sections 2 and 4 is that Section 2 excludes incidental activities performed on or off shift if there is no custom or contract making such activity compensable[5].

Similarly, the treatment of pre-1947 and post-1947 claims differently in other sections of the statute does not illuminate this problem. Section 3 (see Pet. br., pp. 33-34) which provided that past claims could be compromised or waived, was inserted to provide some relief as to past claims should

4. *Glenn L. Martin Nebraska Co. v. Culkin*, 197 F.2d 981 (8th Cir., 1952); *Central Missouri Tel. Co. v. Conwell*, 170 F.2d 641 (8th Cir., 1948); *United States Steel Co. v. Burkett*, 192 F.2d 489 (4th Cir., 1951); *F. W. Stock & Sons v. Thompson*, 194 F.2d 493 (6th Cir., 1952).

5. *Smith v. Cleveland Pneumatic Tool Co.*, 173 F.2d 775 (6th Cir., 1949).

the courts declare Section 2 unconstitutional.[6] Section 9 (see Pet. br., pp. 37-38) allows employers to claim as a good faith defense the rulings, regulations, orders, approval or interpretation of any agency of the United States only for pre-1947 claims. During the period immediately preceding the enactment of the Portal Act the Public Contracts Administrator, the Maritime Commissioner, the War Shipping Administration, the Salary Stabilization Unit of the Treasury Department, the War Labor Board and the Interstate Commerce Commission had all issued interpretations which affected wage and hour questions.

It is clear that there is nothing in the statute to indicate that Section 4 means any more or any less than it says. The other pertinent sections of the Portal Act rather confirm that the common sense interpretation of Section 4 was the one Congress intended. Contrary to the implication of petitioner's brief, the Congressional purpose in enacting the Portal Act was not limited to the "existing emergency" which had arisen as the result of the great number of claims which had been filed prior to its enactment (Pet. br., p. 10). Just as Section 2 of the Portal Act was designed to meet the "existing emergency", so Section 4 was designed to prevent such an emergency from arising in the future.

In Section 1 of the Portal Act Congress found that if the Labor Standards Act continued to be interpreted in accordance with the judicial standards which it desired to disaffirm "*there would be created both an extended and continuous uncertainty* on the part of industry, both employer and employee, as to the financial condition of productive establishments . . ." employees would receive windfall payments, including liquidated damages, of sums for activities per-

6. 93 Cong. Rec. 2131 (Senator Donnell).

formed by them without any expectation of reward beyond that included in their agreed rates of pay"; and "*there would occur the promotion of increasing demands* for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in" (Section 1(a), emphasis added).

To say that Section 4 was designed to make noncompensable only those preliminary and postliminary activities which are unnecessary to the performance of the employees' principal activities is to nullify the purpose for which the statute was enacted, as expressly stated in the Congressional Findings of Fact and Declarations of Policy (Section 1). Moreover, the legislative history of the Act, upon which the Secretary principally relies, even if it were proper to use Congressional debates and reports to nullify the words of the statute as enacted,[7] does not support the petitioner's contention.

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7. "But where the language of an enactment is clear, and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended. And in such cases legislative history may not be used to support a construction that adds to or takes from the significance of the words employed." (*United States v. Missouri Pac. R. Co.*, 278 U.S. 269, 278, 49 S.Ct. 133, 136 (1929)). See, also, *Packard Motor Car Co. v. N.L.R.B.*, 330 U.S. 485, 492, 67 S.Ct. 789, 793 (1947).

B. THE HISTORY OF THE PORTAL ACT IN CONGRESS SHOWS THAT CONGRESS INTENDED SECTION 4 TO PRECLUDE CLAIMS LIKE THOSE INVOLVED IN THE MT. CLEMENS POTTERY CO. CASE AND HERE.

The Senate Report accompanying the Portal Act confirms that Congress was attempting to overrule the *Mt. Clemens* decision, not extend it. This report gives as examples of non-compensable activity "[c]hecking in or out and waiting in line to do so, changing clothes, washing up or showering, waiting in line to receive pay checks, and the performance of other activities occurring prior and subsequent to the workday,[8] *such as the preliminary activities which were involved in the Mt. Clemens case*" (S. Rep. No. 48, 80th Cong., 1st Sess. p. 47). Following this, the Report states that "'principal activity or activities' includes all activities which are an integral part thereof, *as illustrated by*" the examples of the lathe operator who must perform maintenance work on his machine and the garment worker who must come before the other employees to lay out work and ready machines for operation. These examples, the Secretary feels, "perfectly describe the case at bar" (Pet. br., p. 22). In the case of "tool sharpening" he would disregard the many differences between the knifemen in this case, and the lathe operator in the Senate Report. He attaches no significance to the facts that the knives, in contrast to the lathe, belong to the employees (Fdg. VI, R. 16); that they can use them for whatever private purposes they choose (Fdg. VI, R. 16), which naturally affects the amount of sharpening they need; that they can sharpen their knives at any place, at any time outside regular working hours, and in any man-

8. "For purposes of clarity, this report uses the term 'workday' to mean that period of the workday between the commencement by the employee, and the termination by the employee, of the principal activity or activities which such employee is employed to perform." S. Rept. No. 48, 80th Cong., 1st Sess. pp. 46-47.

ner or method they choose (Fdgs. VII, VIII, R. 17); that respondent does not specify the degree of sharpness, the type of edge or the manner or method to be used in sharpening the knives. (Fdg. VIII, R. 17). The petitioner would entirely disregard these manifest differences between the lathe operator and the knifeman in applying this example in the Senate Report. It is entirely correct that if all knife sharpening in any industry comes within the example contained in the Senate Report above, the word "integral" must be expanded to mean "indispensable." But if the example is confined to workmen who as a part of their principal activities, must put in time as maintenance men, the Senate Report does not imply the broad definition of principal activities contended for by petitioner.

Such a test would also be inconsistent with the declared purpose of the Portal Act as set forth in the Senate Report —"The public interest requires a correction of the condition now presented by the portal-to-portal claims, including those in pending suits and safeguards against futur[illegible] repetition of such a condition" (S. Rep. No. 48, 80th Cong., 1st Sess., p. 1). The test in the *Mt. Clemens* case, which Congress was attempting to repudiate, was much narrower than inclusion of everything "indispensable" to the performance of a principal activity. Justice Murphy in *Mt. Clemens* at least confined the period of work to the time "an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place" and "exertion of a physical nature, controlled or required by the employer and pursued necessarily and primarily for the employer's benefit" (328 U.S. at 691, 693, 66 S. Ct. at 1194, 1195). Any activity which is necessary for the worker to perform his job, may be considered indispensable to the performance of a principal

activity but is not *ipso facto* an "integral part of the principal activity."

Of course, we are not arguing that Congress intended to make the activities which were involved in the *Mt. Clemens* case non-compensable under all circumstances (See Pet. br., p. 23). But Congress did make non-compensable, activities like those found compensable in the *Mt. Clemens* case, when performed under like circumstances.

The knife sharpening in this case fits both the words, and the context of the *Mt. Clemens* decision. There is a well-established custom making knife sharpening non-compensable (Compare 328 U.S. at 685). It consumes but a short time (Compare 328 U.S. at 683, 696, 697). It is not productive work (Compare 328 U.S. at 689). It is not even as "necessary" as those activities in the *Mt. Clemens* case, because it need not be done on the employer's premises (Compare 328 U.S. at 691, 692, 693).

The Congressional debates support only this Court's wisdom in refusing to look at isolated remarks in Congress to find out what a statute means. In response to Senator Cooper's comment which petitioner relies upon so heavily (Pet. br. p. 18), Senator Barkley stated:

> ". . . I get the very strong impression, if I am mistaken I wish to be corrected, from reading the bill and the report, and listening to the discussion, that under the definition of portal to portal activities, unless there is a contract, written or unwritten, or a custom under which such activities are compensable, all preliminary and postliminary work required by an employer is non-compensable." 93 Cong. Rec. p. 2350.

Senators McCarran (*Id.* at 2245), McGrath (*Id.* at 2239), Thomas (*Id.* at 2268), Murray (*Id.* at 2237), Wiley (*Id.* at 4269), Ellender (*Id.* at 2297), O'Mahoney (*Id.* at 2299) and Representative Gwynne, one of the Conference Managers

for the House of Representatives (*Id.* at pp. 4388-9), placed the same interpretation on the Portal Act as Senator Barkley. In the face of this, the casual remarks of Senator Cooper, even though he was one of the three-man Subcommittee which drafted the bill[9] do not permit the conclusion that Congress meant "principal activity" to include anything "indispensable" to the performance of the principal activity and drastically restricting the scope of Section 4.

C. THE 1949 AMENDMENTS TO THE LABOR STANDARDS ACT ARE IRRELEVANT TO PETITIONER'S INTERPRETATION OF THE PORTAL ACT.

Section 3(o) of the Labor Standards Act was added in 1949, and excludes from the hours for which an employee is employed any time spent in changing clothes and washing at the beginning or end of each workday which was excluded by a collective bargaining contract.[10] The section was enacted to prevent a very ingenious argument from undercutting the effect of the Portal Act.

In *Galvin v. National Biscuit Co.*, 82 F. Supp. 535, a collective bargaining contract provided that 15 minutes of clothes changing time would be compensated for, but the employees actually took more than 15 minutes to change. It was argued that since a contract provided that this activity was compensable, this activity was exempted from the operation of the Portal Act and *all* the time spent in the activity should be compensated for. The argument did not succeed in this case.

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9. Senator Donnell's remarks concerning the operation of the bill on future claims are quoted at pp. 14-15 *supra*. Senator Eastland also implied that future portal-to-portal claims would be eliminated. See colloquy between Senators McGrath and Eastland at 93 Cong. Rec. p. 2249.

10. Section 3(o) is reprinted in petitioner's brief, p. 40.

Section 3(o) was directed at this type of argument in reference to clothes changing and bathing, as the colloquy between Representatives Herter and Lucas (quoted in its entirety in the brief for Petitioner, pp. 27-29, *Steiner v. Mitchell*, No. 22) shows.

Sec. 16(c) of the Labor Standards Act, which provides that any order, regulation or interpretation of the Administrator of the Wage and Hour Division or of the Secretary of Labor, pursuant to the Labor Standards Act "except to the extent that any such order, regulation, interpretation or agreement may be inconsistent with the provisions of this Act" remains in effect,[11] does not aid the petitioner's argument. The interpretation relied upon by Petitioner (Pet. br., 26-27) is inconsistent (*supra*, pp. 13-21). Moreover, the Petitioner has disregarded other statements that appear in the same long and confusing statement:

> "The 'principal' activities referred to in the statute are activities which the employee is 'employed to perform': they do not include noncompensable 'walking, riding, or traveling' of the type referred to in Section 4 of the Act. Several guides to determine what constitute 'principal activities' were suggested in the legislative debates. One of the members of the conference committee stated to the House of Representatives that 'the realities of industrial life,' rather than arbitrary standards, 'are intended to be applied in defining the term "principal activity or activities,"' and that these words should be interpreted with due regard to general established compensation practices in the particular industry or trade.'" 29 C.F.R. 790.8(a), 12 F.R. 7659-60.

Using these criteria, the activities of the knifemen are not compensable under the Act.

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11. Reprinted in Pet. br., pp. 40-41.

Congress cannot be regarded as ratifying this drastic reinterpretation of the Portal Act merely because the General Counsel of the Associated Retail Bakers of America, William A. Quinlan, submitted a letter to the Subcommittee of the Committee on Labor and Public Welfare (See Pet. br., p. 25).

The situation in this case is very different from that which obtained in *Alstate Construction Co. v. Durkin*, 345 U.S. 13, 73 S. Ct. 565 (1953) and in *Maneja v. Waialua Agricultural Co.*, 349 U.S. 254, 75 S. Ct. 719 (1955). In the *Alstate Construction Co.* case, the construction placed on the words production of goods "for commerce" by the administrators of the Labor Standards Act was consonant with judicial interpretations which had not been repudiated by Congress. And "[t]he new interpretation was reported to congressional committees on a number of occasions. Interested employers severely criticized the Administrator's changes. Specific amendments were urged to neutralize his interpretation." (345 U.S. at 16, 73 S. Ct. at 567). In light of these facts, naturally it is reasonable to assume that Congress was ratifying the administrative interpretation. In *Maneja v. Waialua Agricultural Company, (supra)* the Administrator's interpretation was also changed to conform to judicial interpretation of the Act, and had come to the notice of the subcommittees of both the House and Senate which were considering amendments to the Labor Standards Act. In the instant case, the interpretation was not placed before the sponsors of the Portal Act, the Committee on the Judiciary in the House and Senate but before a Subcommittee of the Committee on Education and Labor in the Senate (See Pet. br., p. 27).

CONCLUSION

In passing the Portal Act, Congress wanted to prevent "the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by the employer or the employee at the time they were engaged in" and found that "the Fair Labor Standards Act of 1938, as amended, has been interpeted judicially in disregard of long-established customs, practices, and contracts between employers and employees."[12] (Section 1). What Congress intended to eliminate were claims for preparatory activity which might be considered work because they benefit the employer, but which the employer does not require to be done in a certain way or at any particular time, and which by long custom and practice have not been compensated for.

It is easy to negate Congress' action in passing the Portal Act, and say that everything indispensable to the performance of the job is compensable. It is more difficult to formulate a workable definition of "principal activity" which will clearly delineate the common sense understanding of "work" which ought to be compensated for, from preparatory activity which the employer ought not to be compelled to clock and supervise. This is not an instance of the employer's not having to compensate for this activity. That knifemen must buy the majority of the knives they use, that they must be replaced frequently, that men must spend time procuring the knives, that they must spend time sharpening the knives, that they have spent time acquiring the skills required to sharpen knives and butcher meat must be taken into consideration in setting the basic wage rate. The Amalgamated

12. See the statements of Representative Walter, 93 Cong. Rec. 2189; Senator Donnell, *id.* at 2111, 2119, 2122, 2182; Senator Malone, *id.* at 2363; Senator Wherry, *id.* at 2194.

Meat Cutters and Butcher Workmen and King Packing Company might have agreed to include knife sharpening time in the collective bargaining agreement. But the union and King Packing Company deliberately struck a bargain which did not include knife sharpening as compensable activity. This contract must be taken as the workable arrangement whereby the needs of both employer and employee are deliberately considered and balanced.

If the petitioner were to succeed in this case, respondent would either have to hire someone to sharpen knives (R. 156), an activity which the knifemen prefer to do themselves (*supra*, p. 2), or supervise the activities in the knife sharpening room (R. 156), keep track of how much time the men actually spent sharpening their knives, and shorten the shift to accommodate knife sharpening time. The Portal Act was designed to guard against such an unforeseen disruption of the respondent's plant.

The respondent respectfully submits that the decision of the District Court, affirmed by the Court of Appeals, should be affirmed here.

Dated: November 3, 1955

Respectfully submitted,

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FEB 24 1956
HAROLD B. WILLEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 39

JAMES P. MITCHELL, Secretary of Labor, United States Department of Labor, *Petitioner,*

vs.

KING PACKING COMPANY, *Respondent.*

Petition of King Packing Company for Rehearing

On Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

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The grounds of this petition are (1) that the Court's decision inadvertently reads out of existence Section 4 of the Portal Act; (2) that the Court's decision disregards the findings of the courts below.

1. The Court's decision inadvertently reads out of existence Section 4 of the Portal Act.

By holding that there is liability for all preliminary activities which are an integral and indispensable part of the principal activities of the employee, the Court has revived

the rule of *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 66 S. Ct. 1187, 90 L.Ed. 1515 (1946), and wholly frustrated the Portal Act. Section 4 of the Portal Act—enacted for the express purpose of nullifying the *Mt. Clemens* decision—is rendered meaningless.

The *Mt. Clemens* case ruled—as does the present decision—that there is liability for only necessary and indispensable preliminary activities: for "the minimum time necessarily spent" (328 U.S. at 692), for activities "pursued necessarily * * * for the employer's benefit," (*id.* p. 693), and "performed solely on the employer's premises. * * *" (*ibid.*). Thus, in the *Mt. Clemens* case, itself, the Court limited liability for preliminary activities to those that were necessary and indispensable. The Court specifically held that preliminary activities in "sharpening tools" were compensable if necessary and indispensable (*ibid.*).

Nevertheless, Congress enacted the Portal Act—Section 4 as well as Section 2—to ameliorate the employer's liability under this rule. The liabilities created by the *Mt. Clements* decision, "immense in amount and retroactive in operation", stressed by the *Steiner* opinion (p. 6)[1] as the basis for the Portal Act, were expressly found by Congress to have arisen because the Fair Labor Standards Act had "been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees. * * *" (Portal Act, § 1(a)). This express Congressional resolve to end such interpretations could only be fulfilled by Section 4. Section 4 alone could prevent further such interpretations. It alone—not Section 2—could prevent future judicial interpretations—such as the present ones—in disregard of customs and contracts, which would result in "wholly unexpected liabilities, immense in amount and retro-

1. *Steiner v. Mitchell*, No. 22 Oct. term, 1955 (decided Jan. 30, 1956).

active in operation".[2] Thus Section 4, as well as Section 2, is necessary to fulfill the avowed purposes of the statute. *Cf. Steiner* opinion, p. 6.

Other purposes as expressed in the Congressional findings can only be fulfilled by Section 4, *e.g.*, the purpose to prevent "windfall payments * * * for activities performed by them without * * * any expectation of reward beyond that included in their agreed rates of pay"; to prevent "the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in"; and to prevent interference with "voluntary collective bargaining."

Section 4—enacted to change the rule of the *Mt. Clemens* case—expressly exempts from the minimum wage and overtime compensation requirements of the Act "*any*" activities "preliminary to or postliminary to" the employee's principal activity. Section 4 cannot rationally be limited to "unnecessary preliminary activities." The Court's decisions in the *Steiner* and *King Packing* cases, erasing Section 4, can only operate to create a new "existing emergency resulting from claims which if allowed, in accordance with *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, would create wholly unexpected liabilities, immense in amount and retroactive in operation" for the period subsequent to May 14, 1947, the date of the Portal Act. The purpose of Congress was to eliminate such liabilities; that purpose was not fulfilled by the enactment of Section 2.

Accordingly, the Court's decision is but a challenge to Congress to wipe out the effect of the *King Packing Com-*

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2. The rule of law established by this Court's present decision will of course operate retroactively as a precedent to be followed in suits for back pay, notwithstanding the particular judgment will operate only prospectively. *Cf. Steiner* opinion, p. 2.

pany decision as it sought previously to wipe out the *Mt. Clemens* decision.

2. The Court's decision disregards the findings of the Courts below.

> "A seasoned and wise rule of this Court makes concurrent findings of two courts below final here in the absence of very exceptional showing of error. [citations]." (Mr. Justice Jackson, concurring, in *Tennessee etc. Co. v. Muscoda Local No. 123*, 321 U.S. 590 at 605).

In the *Steiner* case the Court places great emphasis on the circumstance that the two courts below found that the activities in question were an integral and indispensable part of the principal activities (pp. 5-6); yet the Court ignores the concurrent findings of the two courts below in the *King-Packing* case that the sharpening of the employees' own knives is in fact merely preliminary.

The activities for which compensation is claimed in this case illustrate strikingly the desirability that this Court refuse to substitute its own findings for those of the trier of the facts. The finding that an activity is preliminary, rather than the actual performance of the principal activity, is one of fact. Like the finding of agency under the doctrine of *respondeat superior*, it depends uniquely upon all of the circumstances before the trial court.

These activities, in the case at bar, are the care by a journeyman for *his own tools*. True, the possession of a sharp knife is essential to the knifeman in the performance of his work. Yet, in this case the knife is but an extension of the employee's identity as a journeyman knifeman. Similarly, salesmen are often required to own an automobile which must be maintained in a condition suitable for use in their work. Journeyman carpenters are often required to

possess and care for their own tools of the trade. A great deal of work such as the sharpening of one's own knife is performed in industry. The facts upon which the finding of preliminary versus principal activity must be based will run the whole gamut—from the situation in which the employee is required to service and repair a piece of the employer's machinery to the situation in which an office worker refills his fountain pen before office hours. Each case must be evaluated on its own facts.

The findings of the Courts below were that in this factual situation, time spent by a journeyman in sharpening his own knife constitutes preliminary activity. They should be allowed to stand. These findings are not inconsistent with the findings of the Courts below under the different factual situation of the *Steiner* case.

"By long-established customs, practices, and contracts" from 1938 (enactment of the Fair Labor Standards Act) to 1945 (the *Mt. Clemens* decision) indispensable preliminary activities including tool sharpening were not within the overtime compensation requirement of that Act. In 1945, in the *Mt. Clemens* case, that Act was "interpreted judicially" by this Court "in disregard of [those] long-established customs, practices, and contracts." In 1947 Congress enacted the Portal Act to wipe out the rule of the *Mt. Clemens* case, both as to the past (Section 2) and future (Section 4). "By long-established customs, practices, and contracts" between the King Packing Company and the Butchers Union from 1947 (enactment of the Portal Act) to 1956 (the decision herein) indispensable preliminary activities including tool sharpening were not within the overtime requirements of the Fair Labor Standards Act. In 1956 in the decision

herein, that Act was again "interpreted judicially" by this Court "in disregard of [those] long-established customs, practices, and contracts," despite findings of two courts below to the contrary.

A rehearing should be granted.

Dated: February 17, 1956.

Respectfully submitted.

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Willard S. Johnston hereby certifies that the foregoing petition for rehearing is presented in good faith and not for delay.

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